Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

ROGER M. DONLON,
AN INDIVIDUAL, ET AL.,
Petitioners,

v.

CITY OF OXNARD,
A MUNICIPAL CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN R. JOHNSON
Counsel of Record
HEILY & BLASE
A PROFESSIONAL LAW CORPORATION
590 POLI STREET
VENTURA, CA 93001-2633
(805) 667-4970
(805) 667-4977 fax

HARRY R. HIBBS
HARRY R. HIBBS LAW CORPORATION
290 MAPLE COURT
SUITE 210
VENTURA, CA 93003
(805) 644-9202
(805) 644-6046 fax

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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ISSUES PRESENTED FOR REVIEW

1. Does the *Rooker-Feldman* doctrine deprive the District Court of jurisdiction to hear and decide the merits of a federal taking claim where that claim was not justiciable under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 191 (1985) ("*Williamson County*") until well after this Court denied certiorari to review the prior state court decision?

2. Can *Rooker-Feldman* ever deprive the district courts of jurisdiction to hear and decide the merits of a federal taking claim predicated on or arising from a prior state court holding where this Court lacked jurisdiction to review, or was under a duty to abstain from reviewing, the prior state court holding?

3. Do the lower federal courts abdicate their duty to resolve federal cases and controversies when they refuse to exercise jurisdiction by invoking *Rooker-Feldman* without first considering whether this Court was precluded (by the principles of jurisdiction or abstention) from considering the merits of that claim in the prior state court proceedings?

4. Does *Rooker-Feldman* deprive district courts of jurisdiction to hear a just compensation claim filed under 42 *U.S.C.* § 1983 where that relief can be granted without disagreeing with the prior state court's holdings?

PARTIES TO THESE PROCEEDINGS

1. Petitioners

Petitioners are Roger M. Donlon, an individual; Roger M. Donlon, trustee of the Roger M. Donlon Trust; Timothy R. Donlon, an individual; Timothy Roger Donlon, trustee for the benefit of Michael Joseph Donlon; Timothy Roger Donlon, trustee for the benefit of Brion Paul Donlon; Gregory H. Donlon, an individual; Brion Paul Donlon, an individual; Michael Joseph Donlon, an individual (hereinafter called "Donlons") and Kenneth L. McDonald, as Trustee of the Deed of Trust recorded December 3, 1986 as Instrument No. 86-175829 of Official Records of Ventura County.

2. Respondents

Respondents are the City of Oxnard (hereinafter called "City") and Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center) (hereinafter called "District").

3. Other Parties

There are no other parties to this dispute.

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REQUEST FOR REVIEW

The Donlons respectfully request that this Court issue a writ of certiorari to review the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit (hereinafter called "Ninth Circuit Opinion") which holds a prior unpublished opinion issued by the California Court of Appeal in a judicial foreclosure action filed in state court by Respondents which awarded *lien priority* to Respondents (hereinafter called "State Court Opinion") was so "*inextricably intertwined*" with the federal cause of action the Donlons later filed in District Court for a Fifth Amendment physical taking that the *Rooker-Feldman* doctrine deprived federal courts of jurisdiction to hear the Donlons' Fifth Amendment claim for Respondents' subsequent physical taking of their property (a private lien) for public use (the payment of public debts, the burden of which should be borne by the public as a whole).

OPINIONS BELOW

The opinion of the State Court of Appeal (awarding Respondents' *lien priority*), barring the Donlons from raising federal issues in state court and holding state law did not recognize a taking affected as a result of state law's Mello-Roos Act is unreported and reproduced in App. E at 45a-68a. Its sole modification is reproduced in App. F at 69a-70a.

The judgment of the District Court (holding *Rooker-Feldman* applied to the Donlons' Fifth Amendment takings claim for "just compensation" for the physical take which occurred after the State Court's Opinion was entered and dismissing the Donlons' federal complaint with prejudice and without leave to amend) is unreported and reproduced in App. C at 7a-27a. The District Court's order denying the Donlons'

motion to amend that judgment is unreported and reproduced in App. D at 30a-44a.

The opinion of the Ninth Circuit Court of Appeals (hereinafter called "Ninth Circuit") affirming that *Rooker-Feldman* required the District Court to dismiss the Donlons' complaint with prejudice and without leave to amend is unreported and reproduced in App. B at 4a-6a. The Ninth Circuit's order denying the Donlons' timely petition for rehearing and suggestion for rehearing *en banc* is reproduced in App. A at 1-2a.

JURISDICTION

The Ninth Circuit Opinion was filed on November 2, 2001. (App. B at 4a.) On November 16, 2001, the Donlons filed a petition for rehearing with the Ninth Circuit which suggested a rehearing *en banc.* (App. G at 71a-90a) That petition was denied on February 21, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution which provides, in pertinent part, that

> "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Fifth Amendment to the United States Constitution which provides, in pertinent part, that

> "[n]o person shall . . . be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution which provides, in pertinent part, that

"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

1. The Prior State Court Actions.

a. Respondents' 1988 Validation Action

On June 28, 1988, City filed a state court action on behalf of itself and District to validate City's use of state law[1] to form District and impose a $32 million dollar special tax lien *exclusively* on two parcels of real property located within City for the purpose of providing a means to repay District's proposed $14.77 million dollar bond-offering. (App. C at 9a-10a.)

The proceeds from the proposed bond-offering could only be used to pay for the construction of public improvements required for the development of one of the

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[1] California's Mello-Roos Community Facilities Act of 1982 (*California Government Code §§ 53311, et seq.*).

parcels (hereafter called "Commercial Land"). The special taxes could only be used to repay the bond-offering and expenses related to it. (App. C at 9a-10a.)

The issues to be decided in said state court action (hereinafter called "Respondent's 1988 Validation Action") included: (1) whether City had "validly" conducted the public hearings mandated by state law; (2) whether City had "validly" formed District; (3) whether City had "validly" obtained state law mandated voter-approval of the proposed bond-offering in an election at which only the fee title holder of both parcels (hereinafter called "Developer") was allowed to vote; (4) whether the City's imposition of the special tax and its allocation of its 14% (or about $5 million dollars) to the Commercial Land and 86% (or about $27 million dollars) to remaining parcel (hereinafter called "Farmland") was "valid." (App. C at 9a.)

Under state law, District could not have been formed, the special taxes could not have been levied and imposed, and the bonds could not have been issued *without* Developer's express consent. (App. C at 10a.)

At all relevant times, the Donlons held a validly recorded first trust deed lien against the Farmland as security for the payment of the balance of its purchase price (about $12 million dollars). (App. C at 9a.)

The public hearings and Respondents' 1988 Validation Action were conducted *without* notice to the Donlons despite their clear and present interest in their outcome. (App. C at 11a.)

On August 12, 1988, a judgment was entered, by default, in Respondents' 1988 Validation Action. That

judgment "validated" the public hearings, the formation of District, the bond election, District's proposed bond-offering, the special taxes which were imposed solely for the purpose of repaying District's bond-offering, and the allocation of those special taxes 14% (or about $5 million dollars) to the Commercial Land and 86% (or about $27 million dollars) to the Farmland. (App. C at 12a.)

b. Respondents' 1993 Foreclosure Action.

Predictably, Developer paid the special taxes imposed on the Commercial Land (which provided the Commercial Land with the benefit of $14.77 million dollars in public improvements at a total cost to the Commercial Land of $5 million dollars or so). (App. C at 13a.) Just as predictably, Developer failed to pay the special taxes imposed on the Farmland (which received no benefit whatsoever from the $27 million dollars in special taxes imposed on it and was already encumbered by the Donlons' validly recorded first trust deed lien of about $12 million dollars). (App. C at 13a.)

On April 12, 1993, Respondents filed a second state court action to judicially foreclose solely on the Farmland for Developer's failure to pay the special taxes imposed on it. In said action (hereinafter called "Respondents' 1993 Foreclosure Action") Respondents alleged state law provided the special taxes imposed on the Farmland with *lien priority* over the Donlons' previously recorded and perfectly valid private lien. (App. C at 14a.)

The Donlons first learned that the public hearings had been held and Respondents had filed their 1988 Validation Action and obtained a judgment by default in it *after* Respondents filed their 1993 Foreclosure Action. (App. C at 11a-12a.)

In Respondents' 1993 Foreclosure Action, the Donlons asserted City's special bond election (at which only Developer was allowed to vote) violated the Equal Protection Clause of the 14th Amendment (which mandates that where state law requires an election to approve a bond-offering, the voters at that election cannot be limited to landowners[2]). The Donlons further asserted that an award of *lien priority* to Respondents would violate *Article I, Section 10* of the United States Constitution (which prohibits a state from passing a law which impairs contracts or the means to enforce them[3]) and the Due Process Clause of the 14th Amendment (which requires that "adequate notice" of public hearings and court proceedings be given to those who have a readily ascertainable interest in the proceedings and might be adversely affected by them[4]).

To no avail.

In the State Court Opinion (which awarded *lien priority* to Respondents) the State Court of Appeal clearly and certainly held that state law (Cal. *Code Civ. Proc.*, § 870) barred the Donlons from raising federal issues in

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[2] *See, e.g., City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-213 (1970).

[3] *See, e.g., United States v. City of Quincy*, 71 U.S. 403 (1867); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Energy Reserves Group, Inc. v. Kansas City Light & Power Co.*, 259 U.S. 400 (1983).

[4] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

Respondents' 1993 Foreclosure Action. Specifically, the State Court Opinion held:

> "[*t*]*he judgment in the validation action is binding on the Donlons* and bars them from the institution of ... any action or proceeding or raising any issue as to which the judgment is binding and conclusive. . .*The Donlons may not raise the various constitutional issues presented here.*" (Emphasis added). (App. E at 61a.)

In Respondents' 1993 Foreclosure Action, the Donlons asked for permission to file a cross-complaint grounded on California's counterpart to the Fifth Amendment's takings clause[5] (which, unlike the Fifth Amendment, mandates that just compensation be paid to the owner or into court before his property is taken or damaged for pubic use). (App. E at 56a.)

Again, to no avail.

In clear and certain terms, the State Court of Appeal held it was "too late" for the Donlons to file an inverse condemnation action and state law did not recognize a taking in the circumstances. Specifically, the State Court Opinion held:

> "[t]he instant claim for inverse condemnation constitutes an *untimely* attack on the validity of the formation of the District and its authority

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[5] *Article I, § 9 of the California Constitution.*

> to levy the assessment of the instant taxes *without* personal notice to the Donlons." (Emphasis added) (App. E at 56a.)
>
> "There is no taking here because the lien of the Mello-Roos [Act's] special taxes on the real property supersedes the Donlons' trust deed as a matter of law." (Bracketed material added). (App. C at 60a.)

As the State Court Opinion explains "[t]his short statute of limitations applies here to permit sound fiscal planning. . .and to preclude impairing the marketability of authorized bonds." (App. E at 57a.)

On November 2, 1988, this Court denied the Donlons' petition for a writ of certiorari for review of the State Court Opinion.

2. The Physical Taking

On January 20, 1999, Respondents' caused title to the Farmland to be transferred to District for the purpose of paying its bonds *without* conducting the court-supervised foreclosure sale the State Court Opinion authorized (but did not direct) Respondents to hold. Under state law, this transfer destroyed the Donlons' lien and every interest they had in the Farmland. (App. C at 15a.)

Until this transfer occurred, the Donlons had a valid and enforceable lien (which, among other things, provided them with the rents, issues, and profits from the Farmland of about $10,000.00 per month), and they had every right to expect (or at least hope) that the proceeds from the court-supervised sale would pay their lien in full. After this

transfer the Donlons had no lien, no rents, no compensation, no prospect for a court-supervised judicial sale, and no adequate state remedy for Respondents' physical taking.

In *Williamson County, supra,* 473 U.S. 172, this court squarely held that where a governmental agency is vested with the discretion to act in a fashion that may or may not result in a Fifth Amendment taking, there is no federal Fifth Amendment taking claim "ripe" for adjudication by any court until the governmental agency takes final definitive action. *Williamson County, supra,* at 190-191.

The critical point here is Respondents took the final definitive action required by *Williamson County* on January 20, 1999 by physically taking the Donlons' private property (their lien) for a public purpose (the payment of public debts). It was this physical taking which satisfied the first prong of *Williamson County* (that final definitive action first be taken by the governmental entity) that gave rise to the Donlons' Fifth Amendment claim. Before Respondents' took this final definitive action, no federal or state court had the jurisdiction to rule on the Donlons' federal takings claim. *Williamson County, supra,* 473 U.S. 172, at 190-191. And, it was Respondents' final definitive action (of physically taking the Farmland) and not the State Court Opinion's award of *lien priority* which gave rise to Fifth Amendment physical takings claim the Donlons filed in District Court within one year thereafter.

3. The Lower Federal Court Proceedings.

a. The District Court Dismisses For Lack of Jurisdiction.

On January 19, 2000, the Donlons filed this action in District Court (under 42 *U.S.C.* § 1983) to recover just compensation under the Fifth Amendment for Respondents' physical taking of their private property under circumstances which denied the Donlons just compensation and an adequate means to recover it under state law. (App. C at 15a.)

On April 24, 2000, the District Court held that *Rooker-Feldman* deprived it of jurisdiction to hear the Donlons' claim. It dismissed the Donlons' complaint *without* leave to amend and *with* prejudice on the same day. (App. C at 20a-27a.)

b. The Ninth Circuit Court of Appeals Holds the District Court Properly Dismissed For Lack of Jurisdiction.

On November 1, 2001, the Ninth Circuit Court of Appeals entered its Memorandum Decision which affirmed the District Court's dismissal *with* prejudice and *without* leave to amend. It held:

> "[*t*]*his case falls squarely within the Rooker-Feldman doctrine*. The district court could not have granted relief with respect to the requested subordination without reviewing the state court of appeals' determination that the tax lien has priority. A similar result holds true for the Donlons' just compensation claim. The state court of appeals concluded that there

> was no taking because Oxnard's [Respondents'] interest in the property superseded that of the Donlons. *Both claims are "inextricably intertwined" with the state court's rulings. Therefore, the Rooker-Feldman doctrine bars federal jurisdiction over the Donlons' case."* (Emphasis and bracketed material added). (App. B at 5a.)

c. The Donlons' Petition For Rehearing and Suggestion that a Hearing en banc was Appropriate is Denied Without Comment.

On November 16, 2002, the Donlons filed a petition for rehearing with the Ninth Circuit which suggested a rehearing *en banc* was appropriate. (App. G at 71a-90a.) In that petition the Donlons stressed the very points the Donlons are making to this Court. In particular that petition asserted: (1) that *Rooker-Feldman* has no application to the Donlons' physical takings claim because the District Court *could and should grant relief without* disagreeing with any decision reached by the State Court of Appeal on any issue which was properly before it (and Donlons' Fifth Amendment physical takings claim was clearly not properly before it in the Respondents' 1993 Foreclosure Action) (App. G at 79a and 88a-89a); (2) that *Rooker-Feldman* has no application to the Donlons' physical takings claim because the State Court Opinion patently discloses that the State Court *failed* to provide the Donlons with any opportunity to present their federal issues in State Court (App. G at 79a and 82a); and (3) that *Rooker-Feldman* has no application to the Donlon's Fifth Amendment physical takings claim because it was not "ripe" in the State Court proceedings and this Court lacked Article

III jurisdiction to review it in the prior State Court proceedings. (App. G at 77a-78a and 82a-87a.)

On February 21, 2002, the Ninth Circuit denied the Donlons' Petition for Rehearing without comment. (App. A at 1a-2a.)

REASONS TO GRANT REVIEW

1. Lower Federal Courts and Parties Who Appear Before Them Have a Crying Need for This Court's Guidance on the Question of When and Under What Circumstances *Rooker-Feldman* Applies.

This case presents important and previously unanswered questions as to the limitations imposed on the district courts' Article III federal question jurisdiction by the *Rooker Feldman* doctrine and the proper application of that jurisdictional doctrine. The *Rooker-Feldman* doctrine exists for one and only one purpose: to prohibit the lower federal courts from usurping the exclusive appellate jurisdiction of this Court to review and correct a state court's misapplication of federal law which Congress ceded to this Court under 28 U.S.C. § 1257. It should *only* serve that worthy purpose. But, if mechanically applied, as it was here, to refuse to hear a federal claim arising from a prior court ruling merely because the plaintiff lost in state court and this Court did nothing about it, without giving a moments thought to whether this Court could have done anything about it, the doctrine arbitrarily and without reason bars rightful access to the federal courts.

This case is not an anomaly. Recently there has been an epidemic of federal cases which have been dismissed by

lower federal courts for lack of jurisdiction under the *Rooker-Feldman* doctrine. In these very proceedings, the Ninth Circuit panel assigned to this case announced, at the opening of oral arguments, that this was its "*Rooker-Feldman* Day." Every one of the six cases heard that morning was a *Rooker-Feldman* case. In the past year, the Ninth Circuit has used *Rooker-Feldman* to summarily dismiss over 40 cases with the same brief finding it used here, to wit: the cause of action presented to it was "*inextricably intertwined*" with a state court ruling; therefore the *Rooker-Feldman* doctrine barred federal jurisdiction.

The first important question this case presents is whether *Rooker-Feldman* can be applied by the lower courts to refuse to hear a federal claim that arises from a prior state proceeding when principles of *abstention* counseled against this Court exercising appellate jurisdiction over the prior state court decision? The answer to this question must be in the negative.

In *Quackenbush v. Allstate Insurance Company* 517 U.S. 706, 716, 116 S.Ct. 1712 (1996) ("*Quackenbush*") this Court made two things absolutely clear. First:

> "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. See, e.g., *Colorado River*, 424 U.S., at 821, 96 S.Ct., at 1248 ("[F]ederal courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them'"); *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464-465, 11 L.Ed.2d 440 (1964) ("'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its

> duty to take such jurisdiction'") (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909)); *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not")." *Quackenbush v. Allstate Insurance Company* 517 U.S. 706, 716, 116 S.Ct. 1712.

Second: "[t]his duty is not, however, absolute." *ibid.* Where principles of *abstention* articulated by this Court over the years (in its supervisory role over the Article III courts) like those articulated in *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) are present a federal court has the duty to (and in many cases should) refuse to exercise its Article III jurisdiction.

When the lower federal courts invoke *Rooker Feldman* in a case where settled principals of abstention counseled against this Court's prior intervention, they do so not to avoid usurping this Court's exclusive appellate jurisdiction under 28 U.S.C. § 1257. Rather, they do so to avoid their own "unflagging obligation" to exercise the jurisdiction Congress gave to them under 42 *U.S.C.* § 1983. As the majority of this Court impliedly recognized in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) ("*Pennzoil*") it begs the question to apply *Rooker Feldman* in a case where this Court was required to abstain and could not grant the relief requested upon appellate review of the state judgment.

If a lower federal court lacks jurisdiction over such a claim it cannot possibly be predicated on *Rooker Feldman*. It can only be predicated on a finding that the reason for abstention still exists.

The answer to the second important question presented by this case is even clearer. *Rooker Feldman* can never be applied by the lower courts, as it was here, to refuse to hear a federal claim which seeks to enforce a federal right which arises from a prior state court proceeding when this Court itself entirely lacked jurisdiction to enforce that federal right in the prior state court proceedings.

This Court's landmark decision in *Williamson County* established one fundamental, unalterable and all important principle of federal subject matter jurisdiction to hear a federal taking claim under Article III. *No federal court has subject matter jurisdiction to enjoin a taking of private property for public use under color of state law*. The jurisdiction of the federal courts is restricted to awarding just compensation after an actual taking has occurred. The Donlons' federal taking claim did not arise and become justiciable in any federal court under *Williamson County* until well after the State Court Opinion became final. The District Court was the *first* federal court with jurisdiction to consider that claim. It had the clear and undeniable duty to do so.

It is presently accepted in the lower courts that if "the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined" and Rooker Feldman applies. (See, e.g., *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir.2001) citing *Parkview Assocs. P'ship v. City of Lebanon*, 225 F.3d 321, 325 (3d Cir.2000) and *Charchenko v. City of Stillwater*, 47

F.3d 981, 983 (8th Cir.1995) for that proposition). This formulation of "inextricably intertwined" bears a remarkable resemblance to that embraced by Justice Marshall in his opinion concurring in this Court's judgment in *Pennzoil* , to wit, the federal case is "inextricably intertwined" with a prior state decision when "federal relief can only be predicated upon a conviction that the state court was wrong . . ." *Pennzoil, supra,* 481 U.S. at 25.

But the "inextricably intertwined" test being applied by the lower courts (like the one announced by Justice Marshall in *Pennzoil*) does not focus on the question that must be answered before any court invokes the *Rooker Feldman* doctrine. Did this Court have judicial power under Article III, to grant the relief now requested from the District Court based on appellate review of the prior state court judgment?

The need for this Court to address this important jurisdictional concept should be evident from the result in the case at bar. Here, the Donlons taking claim did not require the District Court to reconsider or reverse any holding by the state court. Far from it, the Donlons' taking claim was in fact predicated on the *finality* of the state court judgment. Since it was not necessary for the District Court to hold that the state court was wrong to grant the relief requested, not even the accepted concept of "inextricably intertwined" applied here.

Certiorari should be granted to reiterate the principles upon which *Rooker-Feldman* is based and to make it clear that it does not apply merely because the federal plaintiff received an unfavorable decision in state court while in the process of exhausting the remedies state law afforded to restrain a public entity from taking property without just compensation.

2. The District Court and Only the District Court Had Article III Jurisdiction to Hear the Donlons' Federal Just Compensation Claim.

In the prior State Court foreclosure proceedings, the "issues" the State Court was required to decide and did decide were limited to:

(1) whether City's bond election violated the U.S. Constitution's Equal Protection Clause. On this issue the State Court *held* the Equal Protection Clause did not apply because it was "too late" for the Donlons to raise this "federal" issue;

(2) whether an award of *lien priority* to Respondents would violate the U.S. Constitution's Contract Clause. On this issue the State Court *held* the Contract clause did not apply because it was "too late" for the Donlons to raise this "federal" issue;

(3) whether an award of *lien priority* to Respondents would violate the U.S. Constitution's Due Process Clause either because Respondents had failed to provide the Donlons with "adequate notice" of the state law mandated public hearings *or* because Respondents had failed to provide the Donlons with "adequate notice" of Respondents' 1988 Validation Action. On these issues the State Court *held* the Due Process Clause did not apply because it was "too late" for the Donlons to raise those "federal" issues;

(4) whether state law's counterpart to the Fifth Amendment's takings clause (which, unlike the Fifth Amendment, mandates that just compensation be paid to the owner or into court before his property is taken or damaged

for pubic use) required Respondents to pay just compensation to the Donlons or into court as a *condition precedent* to the State Court's award of *lien priority* to Respondents. On this strictly State law issue the State Court *held* State law's takings clause did not apply because it was also "too late" for the Donlons to file an inverse condemnation claim under state law and that state law does not recognize any takings claim which emanates from an award of the *lien priority* provided by (State law's) Mello-Roos Act.

The District Court was not required to disagree with a single one of these holdings to award just compensation to the Donlons on their physical taking claim. The Donlons' federal just compensation claim was itself predicated on the binding effect of the state court's lien "priority" determination (which paved the way for the subsequent taking of their property) and its holding that state law provided the Donlons with no just compensation remedy.

What the State Court did not decide and could not decide was whether Respondents' subsequent enforcement of their *lien priority* would give rise to a justiciable taking claim within the meaning of the Fifth Amendment. This is necessarily so because the Fifth Amendment's takings clause does "not proscribe the taking of property; it proscribes taking without compensation" (*Williamson County, supra,* 473 U.S. 172 at 194). The Donlons' Fifth Amendment taking clause argument, unlike the Donlons' Contract, Equal Protection and Due Process Clause arguments, was not a defense to an award of *lien priority*. And, it was not subject to review by this or any other federal court.

The fact that the District Court was the only federal court with original jurisdiction to hear Donlons' physical taking claim is clear from *Robinson v. Ariyoshi*, 753 F.2d

1468 (9th Cir., 1985) ("*Robinson I*"). In *Robinson I*, the Ninth Circuit had before it an appeal from a dismissal for lack of jurisdiction over a federal damage claim (filed under 42 *U.S.C.* § 1983) which, like the Donlons', was based on a prior state law decision. Prior to the commencement of that particular 42 *U.S.C.* § 1983 action in district court, this Court denied three separate petitions for certiorari to review the Hawaii Supreme Court's decision which was alleged to have deprived the plaintiffs of due process and unconstitutionally impaired the plaintiffs' vested water rights. *McBryde Sugar Co. v. Hawaii*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135 (1974); *Robinson v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974); *Albarado v. Hawaii*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974).

Despite this, in *Robinson I* the Ninth Circuit rejected Hawaii's assertion that *Rooker-Feldman* deprived the district court of jurisdiction to hear the plaintiffs' federal "taking" and "due process" damage claims based on that state decision.

This Court granted certiorari in *Robinson I* (*Ariyoshi v. Robinson*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560). But it did not do so to review the Ninth Circuit's holding that *Rooker-Feldman* did not apply. To the contrary, this Court summarily vacated the judgment and remanded the case to the Ninth Circuit for further consideration in light of this Court's landmark jurisdictional decision in *Williamson County, supra*, 473 U.S. 172.

On remand, the Ninth Circuit held that the case did not present a ripe federal case or controversy (because plaintiffs had not yet sustained definitive individualized damage); and it remanded the case to the district court with instructions to dismiss it for lack of an Article III case or controversy.

Robinson v. Ariyoshi, 887 F.2d 215, 216 (9th Cir.1989) (*Robinson II*).

The history of *Robinson I* and *Robinson II* make three things perfectly clear. One, *Rooker-Feldman* did not deprive the District Court of jurisdiction in the case at bar. Two, under *Williamson County* the first federal court to acquire jurisdiction over the Donlons' physical taking claim was the District Court. Three, the District Court did not attain jurisdiction over that claim until January 20, 1999, when the actual definitive physical taking of the Donlons' property occurred.

As this Court made clear recently in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 122 S.Ct. 1465 (No. 00-1167) (2002) ("*Tahoe-Sierra*") at that point Respondents had the "categorical duty to compensate" the Donlons for what they had taken. Certiorari should be granted to make it equally clear that the District Court had the categorical duty to hear the Donlons' federal just compensation claim.

3. *Rooker-Feldman* Does Not Apply to a Fifth Amendment Physical Taking Claim Which Was Not "Ripe" for Adjudication When the Prior State Court Decision Was Entered.

From the precedents cited in the preceding section, it should be self-evident that *Rooker-Feldman* cannot apply to the prior State Court Opinion in the case at bar because it was entered before the federal taking issue presented in the subsequent federal action was "ripe" for adjudication by any court. Were it otherwise, state courts could (and no doubt would), over time, usurp federal jurisdiction over all federal taking claims.

4. Where this Court Lacked Jurisdiction or Had the Duty to Abstain from Reviewing the Merits of a Prior State Court Proceeding *Rooker-Feldman* Cannot Rightfully Be Applied.

Rooker-Feldman takes its name from this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462 (1983). *Rooker* held that federal statutory jurisdiction over direct appeals from state courts (now 28 *U.S.C.* § 1257) lies exclusively in the Supreme Court and is beyond the original jurisdiction of the federal courts. See *Rooker, supra,* 263 U.S., at 415-416. In *Feldman*, this Court extended that *statutory* limitation to issues of federal law which, if raised in the prior state proceeding, would have been subject to appellate review by this Court. But, this Court has never held that *Rooker-Feldman* precludes the district courts from granting a federal remedy, where, as here, this Court lacked Article III jurisdiction to grant that remedy in the exercise of its exclusive statutory appellate jurisdiction over the prior state court proceedings.

In *Feldman* all members of this Court agreed that the first and most important question that *must be asked and answered* by any court before invoking *Rooker-Feldman* is whether the federal-questions and relief requested in the present dispute could have been vindicated and enforced by this Court in exercise of its exclusive appellate jurisdiction under 28 *U.S.C.* § 1257 in the prior state court suit.[6]

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6 Justice Steven, the sole dissenter in *Feldman*, did not take exception with the majority's holding that preclusion should extend to any federal claim that is "inextricably intertwined" with

The Ninth Circuit made no effort to consider this essential issue. It adopted in place of that inquiry, the solitary view articulated by Justice Marshall in *Pennzoil, supra,* 481 U.S. 1, 107 that this Court's Article III jurisdiction over the prior state court ruling was irrelevant to application of *Rooker-Feldman*. In *Pennzoil*, Justice Marshall, and only Justice Marshall, believed that *Rooker-Feldman* applied in any case "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil, supra,* 481 U.S., at 25 (Marshall, J., concurring in judgment).[7]

On the other hand, the majority in an opinion authored by Justice Powell in which Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia joined, held that all federal courts, including the United States Supreme Court lacked Article III jurisdiction to consider Pennzoil's constitutional challenge to the application of Texas' undertaking requirements based on the principles articulated by this Court in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 760, 27 L.Ed.2d 669 (1971) and reversed on that basis.

Not only did these Justices reject Justice Marshall's reliance on *Rooker-Feldman*, Justice Blackmun (who filed an opinion concurring in the reversal by finding the district court lacked jurisdiction under this Court's decision in *Railroad*

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the issues raised in the prior proceeding. His dissent focused exclusively on his belief that the prior decision did not present a justiciable federal "case or controversy" ripe for this Court's review in the first instance. (*Feldman, supra,* 460 U.S. at 489-490.)

[7] Which is not the case here for the reasons previously addressed above.

Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)) also disagreed that *Rooker Feldman* applied. In their separate opinions concurring in the reversal, Justice Brennan and Justice Stevens each expressly disagreed with Justice Marshall's invocation of *Rooker-Feldman.* Finally, Justice Scalia, who concurred with majority opinion filed a separate concurring opinion in which Justice O'Connor joined, to make it clear that "the so-called *Rooker-Feldman* doctrine" had nothing whatsoever to do with the district court's lack of subject matter jurisdiction "to decide Texaco's challenge to the constitutionality of the Texas stay and lien provisions." *Pennzoil, supra,* 481 U.S., at 18 , 107 S.Ct. 1519, 1529.

In *Pennzoil* the vote against Justice Marshall's invocation of *Rooker-Feldman* was 8 to 1.

In the case at bar, certiorari should be granted to make it clear that *Rooker-Feldman* does not apply where the settled principles articulated by this Court in either *Williamson County*, *Younger* or *Pullman* prohibited this Court from previously granting the relief the Donlons now seek (of just compensation) from the District court.

As already mentioned, the state court applied the Mello Roos Act's short statute of limitation to preclude it from considering the merits of the Donlons' constitutional objections to Respondents' assertion of lien priority for one reason "[t]his short statute of limitations applies here . . . to preclude impairing the marketability of authorized bonds." (App. E at 57a.) Although this Court and the District Court had discretion (if not a duty) to abstain from reconsidering the state court's priority decision because a decision in the Donlons' favor on that issue would impair the marketability of all Mello Roos bonds sold in the entire state, once the

Donlons' property was taken to pay the bonds at issue, in this particular case, the District Court had the jurisdiction and the clear duty to hear the Donlons' claim for just compensation against the Respondents.

5. The Fact That Respondents Utilized State Court Proceedings to Ultimately Affect a Taking Does Not Bring *Rooker-Feldman* into Play and Does Not Relieve Them of Their Categorical Duty to Compensate the Donlons for That Taking.

In *Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, (1897) ("*Chicago*") it was made clear that no matter what method the state used to affect a taking (including court proceedings) the Fourteenth Amendment was violated where the proceedings were concluded *without* providing for the payment of just compensation. *Chicago, supra,* 166 U.S., at 235-236.

In this Court's landmark taking decision of *Armstrong v. United States,* 364 U.S. 40 (1960) ("*Armstrong*"), this Court changed its focus in taking cases from the 14th Amendment (*Chicago*) to the Fifth Amendment (*Armstrong*). *Armstrong, supra,* is almost a mirror image to the Donlons' case. In it, the plaintiff, a materialman, lost his ability to enforce his lien when the federal government took title to his security (boats) from the prime contractor. The federal government then refused to honor Armstrong's lien. In the ensuing contest between the lien holder (Armstrong) and the federal government (the U.S. Navy), the U.S. Navy's defense was grounded on its undeniable governmental immunity and Armstrong's offense was grounded on the Fifth Amendment.

In *Armstrong*, this Court held a federal taking had occurred without even addressing the question of governmental immunity. In so doing, it made it crystal clear where private property is taken for a public purpose, the Fifth Amendment is not concerned with the method the governmental entity used to effect the taking. Rather, the Fifth Amendment is only concerned with the burden that method placed on the private property owner. It held:

> "[t]he Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong, supra,* 364 U.S., at 48).

In the case at bar, it appears certain that Respondents' enforcement of their *lien priority* forced the Donlons "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Whether that burden was "lawfully" or "unlawfully" imposed on the Donlons is as irrelevant and immaterial in this case as it was in *Armstrong*.

The District Court Opinion directly disavows *Armstrong* by holding *Rooker-Feldman* applies because the District Court could not grant the Donlons' just compensation relief *without* overturning the State Court's award of *lien priority* to Respondents. This is not the law and it never has been. If it were, few, if any, would ever receive the "just compensation" guaranteed them by the Fifth Amendment.

Certiorari should be granted to make it clear the lower federal courts have the duty to hear a dispute when a local

entity, acting under color of state law (as articulated by the state court), has imposed a public burden unfairly on a private party in violation of the principles articulated in *Armstrong*. And, that where, as in *Armstrong*, a physical taking is involved the taker of that private property has the "categorical duty to compensate" for what has been taken. *Tahoe-Sierra, supra,*, 122 S.Ct. 1465 (No. 00-1167) (2002).

CONCLUSION

The ugly truth is Respondents have thus far avoided the categorical duty the Fifth Amendment imposes on them to compensate the Donlons for what they have taken and the lower federal courts have thus far avoided the categorical duty Article III imposes on them to consider the merits of the Donlons' claim and to enter a judgment under 42 *U.S.C.* § 1983 requiring Respondents to pay "just compensation" to the Donlons if the facts they allege are proven.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John R. Johnson
Counsel of Record
HEILY & BLASE
A Professional Law Corporation
590 Poli Street
Ventura, California 93004
(805) 667-4970

By Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56226

[Filed February 21, 2002]

ROGER M. DONLON, an individual, et al.,	)
Plaintiffs - Appellants,	)
v.	)
CITY OF OXNARD, a Municipal Corporation, et al.,	)
Defendants - Appellees.	)

On Appeal From
D.C. No. CV-00-00607-DT
Central District of California,
Los Angeles

Before: B. FLETCHER, D.W. NELSON, and McKEOWN, Circuit Judges.

ORDER

The panel has unanimously voted to deny the petition for rehearing. Judge McKeown has voted to deny the petition for rehearing en banc and Judge Fletcher and Judge Nelson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56226

[Filed November 2, 2001]

Roger M. Donlon, an Individual; Roger M. Donlon, Trustee of the Roger M. Donlon Trust; Roger M. Donlon, Trustee of The Roger M. Donlon Trust Dated November 9, 1982; Timothy R. Donlon, an Individual; Timothy R. Donlon, Trustee for The Benefit of Michael Joseph Donlon; Timothy R. Donlon, Trustee for the Benefit Of Brion Paul Donlon; Gregory H. Donlon, an Individual; Brion Paul Donlon, An Individual; Michael Joseph Donlon, An Individual; Kenneth L. McDonald, Successor Trustee of the Deed of Trust Recorded December 3, 1986 as Instrument No 86-175829 Of Official Records of Ventura County,	)
Plaintiffs - Appellants,	)
v.	)
City of Oxnard, a Municipal Corporation; Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center), a Community Facilities District,	)
Defendants - Appellees.	)

On Appeal from
United States District Court
for the Central District of California
D.C. No. CV-00-00607-DT
Dickran M. Tevrizian, District Judge, Presiding

JUDGES:
Before: B. FLETCHER, D.W. NELSON, and McKEOWN, Circuit Judges.

MEMORANDUM*

Roger M. Donlon, various trustees, and other parties (the "Donlons") appeal from the district court order dismissing their complaint. The Donlons filed their federal complaint after having lost a state court case in which they were the defendants. The state court determined that the Donlons' interest in a 181-acre plot of land located in the City of Oxnard was subordinate to Oxnard's interest in the property, a tax lien. Both the California Supreme Court and United States Supreme Court denied certiorari. Thereafter, the Donlons brought suit in federal district court. Their first cause of action was for a judicial declaration that: 1) the state court's ruling in the validation action is a final, binding judgment enforceable against Oxnard and 2) the Equal Protection Clause and/or Due Process Clause require that the special tax lien be subordinated to the Donlons' interest in the property. The second cause of action was for a taking in violation of the Constitution. Pursuant to the Rooker-Feldman

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

doctrine, the district court dismissed the case for lack of subject matter jurisdiction. For the reasons stated below, we affirm.

District courts are courts of original jurisdiction and are not permitted to review final state court decisions. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923). In District of Columbia Court of Appeals v. Feldman, the Supreme Court elaborated on Rooker, observing that district courts have jurisdiction over "general attacks on the constitutionality" of laws provided that entertaining any such challenge does not require reviewing "a final state court judgment in a particular case." 460 U.S. 462, 486 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Reviewing a final state court judgment is unavoidable where the constitutional claims are "inextricably intertwined" with the state court's rulings. *Id.* 486-87. "Claims are inextricably intertwined when the district court must scrutinize both the challenged rule and the state court's application of that rule." *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 222 (9th Cir. 1994) (citations omitted).

This case falls squarely within the Rooker-Feldman doctrine. The district court could not have granted relief with respect to the requested subordination without reviewing the state court of appeals' determination that the tax lien has priority. A similar result holds true for the Donlons' just compensation claim. The state court of appeals concluded that there was no taking because Oxnard's interest in the property superceded that of the Donlons. Both claims are "inextricably intertwined" with the state court's rulings. Therefore, the Rooker-Feldman doctrine bars federal jurisdiction over the Donlons' case.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 00-00607 DT (MANx)
[Filed April 24, 2000]

Roger M. Donlon, an Individual; Roger M. Donlon, Trustee of the Roger M. Donlon Trust; Roger M. Donlon, Trustee of The Roger M. Donlon Trust Dated November 9, 1982; Timothy R. Donlon, an Individual; Timothy Roger Donlon, Trustee for The Benefit of Michael Joseph Donlon; Timothy R. Donlon, Trustee for the Benefit Of Brion Paul Donlon; Gregory H. Donlon, an Individual; Brion Paul Donlon, An Individual; Michael Joseph Donlon, An Individual; Kenneth L. McDonald, Successor Trustee of the Deed of Trust Recorded December 3, 1986 as Instrument No 86-175829 Of Official Records of Ventura County,

Plaintiffs - Appellants,

v.

City of Oxnard, a Municipal Corporation; Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center), a Community Facilities District, Does 1 through 10, Inclusive,

Defendants - Appellees.

ORDER **GRANTING IN PART & DENYING IN PART** DEFENDANTS CITY OF OXNARD AND COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD'S REQUEST FOR JUDICIAL NOTICE; ORDER **GRANTING IN PART & DENYING IN PART** PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE; AND ORDER **GRANTING** DEFENDANTS' MOTION FOR DISMISSAL UNDER F.R.C.P. 12(b) FOR LACK OF SUBJECT MATTER JURISDICTION WITH PREJUDICE AND WITHOUT LEAVE TO AMEND

This is an action by Plaintiffs ROGER.M. DONLON, an individual, ROGER M. DONLON, trustee of the Roger M. Donlon Trust, ROGER M. DONLON, trustee of the Roger M. Donlon Trust dated November 9, 1982, TIMOTHY R. DONLON, an individual, TIMOTHY ROGER DONSON, trustee for the benefit of Michael Joseph Donlon, TIMOTHY ROGER DONLON, trustee for the benefit of Brion Paul Donlon, GREGORY H. DONLON, an individual, BRION PAUL DONLON, an individual, MICHAEL JOSEPH DONLON, an individual (collectively, "Donlons"), KENNETH L. McDONALD ("McDonald"), successor trustee of the Deed of Trust recorded December 3, 1986, as instrument No. 86-175829 of official Records of Ventura County, (collectively, "Plaintiffs") against Defendants CITY OF OXNARD ("City"), a municipal corporation, COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD (OXNARD TOWN CENTER) ("District"), a Community Facilities District, and Does 1 through 10 (collectively, "Defendans") seeking declaratory relief against all Defendants and just rompens'ation for deprivation of constitutional rights under color of state law pursuant to the United States Constitution and Title 42,

United State Code, Section 1983.

The following facts are alleged in the Complaint:

On or about December 3, 1986, real property consisting of 181 acres ("Subject Property"), located in the city, was sold to Warmington-Semler Partners ("Buyer"), a general partnership, for $12 million, paid mostly by a promissory note executed and delivered by Buyer in the principal amount of $11,694,587 ("Purchase Money Note"). *See* Complaint, ¶ 15. Buyer conveyed fee title to the Subject Property to First American Title Insurance Company ("First American") by way of a "corporation deed of trust with assignment of rents" ("Deed of Trust"), which was recorded on December 3, 1986, as Instrument No. 86-175829 of Official Records of Ventura County. *Id.* at ¶¶ 16-17. From December 3, 1986, and continuing until January 20, 1999, First American and its successor trustee, McDonald, (collectively, "Trustee") held fee title to the Subject Property for the benefit of named beneficiaries under the Deed of Trust and their successors, including the Donlons. *Id.* at ¶ 18.

On February 27, 1987, the Donlons purchased an interest in the Purchase Money Note and the underlying Deed of Trust from the owner of the note and beneficiary under the Deed of Trust, and recorded such interest as Instrument No. 87-028354 of Official Records of Ventura County. *Id.* at ¶ 19.

On June 28, 1988, the city filed an action ("Validation Action") in the Superior Court of the State of California for the County of Ventura (case no. 102218) on behalf of the District to obtain "validation" of the City actions, including:

(a) forming the District[1]; (b) authorizing the District to issue $14,770,000 in tax-free bonds ("District's Tax-Free Bonds") which the Oxnard City Council ("City Council") earmarked to fund improvements to thirty acres of real property adjacent to Subject Property ("Commercial Property"); (c) imposing a special-tax ("Special Tax") exclusively on Subject Property and Commercial Property of $37 million to pay the District's Tax-Free Bonds and expenses; and (d) allocating and charging the Special Tax, consisting of fourteen percent, or $5 million, to Commercial Property and 86%, or $32 million, to Subject Property (collectively, "Formation Actions"). *Id.* at ¶ 22-23.

The Mello-Roos Community Facilities Act of 1982 [California Government Code §§ 53311, et seq.] ("Mello-Roos Act") mandated that the proceeds from the Special Tax must be used exclusively to pay District's Tax-Free Bonds and expenses. Id. at ¶ 26.

The Mello-Roos Act also mandated that the City Council must obtain "voter approval" of the Formation Actions. *Id.* at ¶ 27.

In elections to obtain voter approval, the City Council allowed only the fee-title owner of the Commercial Property ("Developer") to vote, and barred every other person from the ballot box. *Id.* at ¶ 28.

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[1] The District is a community facilities district formed in 1988 by the Oxnard City Council under the authority granted to the City Council by "The Mello-Roos Community Facilities Act of 1982," an act passed by the California Legislature.

The Mello-Roos Act specifically provided that the Special Tax could not be on, or based upon, ownership of real property. *Id.* at ¶ 29.

Prior to the Formation Actions, the City Council decreed that the Special Tax was "not a tax on or based upon the ownership of real property." *Id.* at ¶ 30.

Plaintiffs claim that the Special Tax is not a true tax, but rather is part of a private financing scheme orchestrated by the City and laundered through the District under color of state law. *Id.* at ¶ 31.

The only notice provided to Trustee or the Donlons regarding the Validation Action or the Formation Actions was by newspaper publication. *Id.* at ¶ 33. Each newspaper publication failed to meet the notice requirements of the due process clause of the 14th Amendment to the United State Constitution. *Id.* at ¶ 34.

In the Validation Action, the City obtained a state court order authorizing the City to serve the summons and complaint by newspaper publication only. *Id.* at ¶ 35. The state court order was obtained based upon the City's declaration that "the persons who would be interested in the issues before the court would be any person who might acquire property within the district"; and the City "lacks knowledge as to the identity or location of any . . . persons who may be interested in this action." Id. at ¶ 36.

To obtain judgment in state court, the City declared that its Formation Actions Were consistent with the 5th and 14th amendments to the U.S. Constitution because Developer

was the only person with a significant interest in the Formation Actions, and he had received notice and voted. *Id.* at ¶ 38. There was never any mention in the state court Validation Action or the Formation Actions of the previously recorded Deed of Trust or the Donlons' previously recorded interest in it. *Id.* at ¶¶ 39-41.

On August 12, 1988, the City obtained a state court default judgment in the Validation Action ("Validation Judgment"). *Id.* at ¶ 43.

Whether the City's Special Tax did or did not have lien priority over the Deed of Trust was a matter which could have been adjudicated by the state court in the Validation Action. *Id.* at ¶ 46.

It is certain that, from the representations made by the city to the state court, the Validation Judgment adjudicated the issue of lien priority, in favor of the previously recorded Deed of Trust. *Id.* at ¶ 47. The City and the District dispute this contention. *Id.* at ¶ 50.

Plaintiffs desire a judicial determination from this Court that the state court Validation Judgment is a final judgment binding against the City and the District on the issue of lien priority. *Id.* at ¶ 51.

In addition to a declaration by this court that the Deed of Trust has lien priority over the Special Tax, Plaintiffs seek just compensation for private property taken from Plaintiffs by the city and the District for public use. *Id.* at ¶ 54. The District's Tax Free Bonds were sold and proceeds used to fund improvements to Commercial Property. *Id.* at ¶ 56. The

Subject Property benefitted from neither the bonds nor the improvements. *Id.* at ¶ 57. Developer, while paying the Special Tax on Commercial Property, immediately defaulted on payment of Special Tax on Subject Property. *Id.* at ¶ 58.

Based upon the default, on April 12, 1993, the City and the District filed a state court action in the Superior Court of the State of California for the County of Ventura (case no. 1256654) to judicially foreclose on the Subject Property ("Foreclosure Action"). *Id.* at ¶ 60-61.

In the Foreclosure Action, the City and the District, for the first time, asserted that the Special Tax had lien priority over the Deed of Trust, which is neither supported by the Mello-Roos Act nor by the laws passed to impose the Special Tax. *Id.* at ¶ 62-65. Furthermore, this contention is refuted by the Validation Judgment and violates Article One, section 10 of the United States Constitution. *Id.* at ¶¶ 66-67.

One of the defendants in the Foreclosure Action, Bank of A. Levy ("Bank"), moved the state court for summary judgment against the City and the District. *Id.* at ¶¶ 70-71.

In response, the city and the District filed a motion for summary judgment, claiming that they were not required to record a lien to have a lien because California Government Code section 53340 (of the Mello-Roos Act) automatically provided them with a "continuing lien against each parcel to be foreclosed upon." *Id.* at ¶ 74. On February 2, 1995, summary judgment was entered in Bank's favor. *Id.* at ¶ 75.

On November 5, 1994, the State Appellate Court held that the trial court had correctly ruled the Mello-Roos Act did

not provide the City and the District with a lien. *Id.* at ¶ 78.

However, the State Appellate Court created a new cause of action for the City and the District, reforming the Mello-Roos Act, based upon an argument the City and District never made: that Special Tax "was on or based upon the ownership of real property. " *Id.* at ¶ 80. Thus, a lien was applied to the Special Tax by California Revenue and Taxation Code section 2187.[2] *Id.*

This finding by the State Appellate Court is refuted by Resolution No. 9465 (adopted and passed on June 18, 1988) that the city's Special Tax was "not a tax on or based upon the ownership of real property." *Id.* at ¶ 82. Plaintiffs claim that the finding is also refuted by the Validation Judgment and by the Mello-Roos Act.[3] *Id.* at ¶¶ 83-84.

Based on the actions of the State Appellate Court, the Special Tax was elevated to the status of an ad valorem property tax in violation of federal and state law. *Id.* at ¶ 88.

On March 31, 1998, the State Appellate Court issued its opinion against the Donlons ("Appellate Opinion"). *Id.* at ¶ 93.

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[2] This code section exclusively creates a lien for property taxes imposed on an ad valorem basis by a county. *Id.* at ¶ 81.

[3] California Government Code § 53235.5 of the Mello-Roos Act states that "[a] special tax apportioned on any of these bases shall not be construed to be on or based upon the ownership of real property."

The Appellate opinion barred the Donlons from stating a cause of action for inverse condemnation, because the claim was alleged to be untimely and the thirty-day statute of limitations had run. *Id.* at ¶ 95.

On January 20, 1999, the County of Ventura conveyed the Subject Property to the District without providing the Donlons with the opportunity to bid at the "tax sale." *Id.* at ¶ 99.

The Donlons and the Trustee had their private property taken for public use.[4] *Id.* at ¶ 100. Plaintiffs are seeking the total unpaid balance of the Purchase Money Note at the time of the taking as their just compensation. *Id.* at ¶ 102.

B. Procedural Summary

On January 19, 2000, Plaintiffs filed the Complaint for Deprivation of Constitutional Rights under Color of State Law.

On February 14, 2000, Defendants filed a Stipulation Extending the Time Within Which to Answer or Otherwise Respond to the Initial Complaint.

On March 15, 2000, Defendants filed a Motion to Dismiss under F.R.C.P. 12(b) and filed a Request for Judicial

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[4] Trustees' private property consisted of title to the subject Property and the Donlons' private property consisted of the Purchase Money Note and their interest in the Deed of Trust.

Notice, which are currently before this Court.[5]

On April 10, 2000, Plaintiffs filed a Request for Judicial Notice.

II. Discussion

A. Plaintiffs' and Defendants' Request for Judicial Notice

A court must take judicial notice if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This Court may take judicial notice of facts outside the pleadings without converting the motion to one for summary judgment. *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986)(citing *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956)).

A court may take judicial notice of "records and reports of administrative bodies." *Mack*, 798 F.2d at 1282 (citing *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953). In addition, documents whose contents are alleged in a complaint and

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[5] This Court notes that Defendants' erroneously refer to themselves as "Attorneys for Plaintiffs" in their pleadings' captions.

whose authenticity is not in question may be considered in a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *cert. denied*, 512 U.S. 1219. In addition, this Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (courts may take judicial notice of their own records).

Plaintiffs filed a Request for Judicial Notice wherein they request that this Court take judicial notice of approximately 52 documents. Defendants have also filed a Request for Judicial Notice wherein they request that this Court take Judicial notice of approximately 9 documents. As set forth herein, this Court relied on only certain of these documents in its analysis. As such, it is not necessary for purposes of determining this motion that this Court take judicial notice of the remaining documents. Accordingly, pursuant to the standard set forth above, this Court takes judicial notice of the following documents:

1) the Donlons' appellants' opening brief;

2) the Donlons' appellants' reply brief;

3) the notice from the Clerk of the United States Supreme Court, dated November 2, 1998;

4) the Court of Appeal of the State of California, Second Appellate District, Division Six,

opinion, dated March 31, 1998;

5) a copy of stipulation Granting Limited Relief from the Automatic Stay to the City of Oxnard to Pursue Appellate Proceedings, dated September 18, 1997; and

6) a copy of the judgment by the Superior Court of the State of California for the County of Ventura, dated August 11, 1988.

B. Standard

Federal courts are courts of limited jurisdiction. Federal courts are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, when a defendant brings a motion to dismiss for lack of subject matter jurisdiction, pursuant to F.R.C.P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. *See Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 378 (1994).

C. Analysis

1. This Court. Does Not Have Subject Matter Jurisdiction Over Plaintiffs' Claims Because the Claims are Barred by the Rooker-Feldman Doctrine

Defendants claim that this Court lacks subject matter jurisdiction over Plaintiffs' declaratory relief and just

compensation claims, in that the lawsuit is barred by the Rocker-Feldman Doctrine. Specifically, Defendants argue that the Appellate Opinion was a final judgment, barring the federal courts from reviewing that state court decision.[6] In contrast, Plaintiffs contend that the Appellate Opinion is not a final judgment. Unfortunately, even if this Court were to agree that an error has been committed, this Court must agree with Defendants that Plaintiffs' claims are barred by the Rooker-Feldman doctrine. Plaintiffs offer no valid arguments or case law to support its contention.

It is a settled principle that the United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983). Pursuant to 28 U.S.C. section 1257, the proper court in which to obtain such review is the United States Supreme Court. *Id.* at 476. "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986); *see also Feldman*, 460 U.S. at 484-86 ("[t]his rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights"). The policies behind this rule are that state courts are as competent as federal courts to decide federal constitutional issues and that any other rule would result in a waste of judicial resources and unnecessary friction between

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[6] The Donlons appealed the second amended summary judgment for judicial foreclosure granted by the trial court in favor of the City and the District.

state and federal courts. *Worldwide Church of God*, 805 F.2d at 891.

In *Feldman*, the United States Supreme Court acknowledged the implications of res judicata in a jurisdiction context.[7] Specifically, the District of Columbia Court of Appeals had refused to admit Feldman to the District of Columbia bar because he had not graduated from law school, a prerequisite to admission under the District's bar rules. Feldman filed a complaint in federal district court claiming that the highest court in the district's refusal to admit him to the bar violated his constitutional rights. The United States Supreme Court held that the federal district court had no jurisdiction to review Feldman's constitutional challenge to the application of the bar rule in his particular case. *Feldman*, 460 U.S. at 486-87. The Supreme Court explained that "[i]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state court decision." *Id.* at 483-84 n. 16.

a. Plaintiffs' First Claim for Declaratory Relief

In the first claim, Plaintiffs state that they seek a declaration that the Deed of Trust has lien priority over the Special Tax. *See* Complaint, § 51. However, that issue is

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[7] The Supreme Court cited to one of its previous opinions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

barred by the Rooker-Feldman Doctrine because the Appellate Opinion directly addressed this issue, and a final determination followed. The Court of Appeal of the State of California, Second Appellate District, Division Six ("Appellate Court"), issued an opinion ("Appellate Opinion") on March 31, 1998.[8] In the Appellate Opinion, the Appellate Court acknowledged that Plaintiffs raised the issue of lien priority, stating:

> The Donlons contend that the special taxes are not secured by the lien on real property provided by Revenue and Taxation Code section 2187, that any such lien has no priority over their deed of trust and that the published notice provided to establish the District was unconstitutional.

Appellate Opinion attached as Exhibit D to Defendants' Request for Judicial Notice. The Appellate Court, in directly addressing Plaintiffs' contention, responded by stating:

> The Donlons opine that the instant lien for the special taxes does not have priority over its mortgage. They are incorrect. It is well-established that there is . . . no constitutional objection to a legislative provision making the county's lien superior to preexisting mortgages . . . .' (*Guinn Institution for Savings v. Mayor and Aldermen of Jersey City*, 113 U.S. 506

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[8] The Donlons' petition for a writ of certiorari to the United States Supreme Court was denied in *Donlon v. City of Oxnard*, No. 98-440. *See* Request for Judicial Notice, Exh. F.

(1985)).

Id.

The Appellate Court further stated:

> Revenue and Taxation Code section 2192.1 specifically states that '[e]very tax declared in this chapter to be a lien on real property . . . [has] priority over all other liens on the property, regardless of the time of their creation. Any tax . . . .described in the preceding sentence shall be give priority over . . . any . . . deed . . . with respect to which the subject real property may become charged or liable.'

Id.

In their Opposition, Plaintiffs contend that the Appellate Opinion is void for several reasons, including that it violates the Bankruptcy Court's automatic stay and Order; it exceeds the issuing court's subject matter jurisdiction; it violates the due process provisions of the Fifth Amendment's Takings Clause; and it violates the Fourteenth Amendment's due process requirement of a full, fair and impartial hearing. *See* Opposition, pg. 12, ln. 5-10. This Court finds, however, that these arguments are of no merit as they were addressed in the Appellate Opinion. In regards to the Bankruptcy Stay, Gregory Donlon filed Chapter 11 bankruptcy on August 28, 1997. The California Appellate Court "vacated the stay . . . so that the cause may proceed on appeal" *See* Appellate Opinion attached as Exhibit D to Defendants' Request for

Judicial Notice. In regards to the 5th Amendment Takings argument, this too, as addressed herein in this Order, was presented to the california Appellate Court. "If consideration and decision have been accomplished, action in federal court is an impermissible 'appeal' from the state court decision." *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985).

As such, this Court is barred from determining Plaintiffs, claim for declaratory relief.

b. Plaintiffs, Second Claim for Just Compensation

Plaintiff's second claim seeks just compensation for a physical taking of land for public use in violation of the Fifth Amendment to the United States Constitution. This argument must also fail as it was directly addressed by the Appellate Court. In the Appellate Opinion, the court states, "there is no taking here because the lien of Mello-Roos special taxes on the real property supersedes the Donlon's trust deed as a matter of law.[9] Appellate Opinion attached as Exhibit G to Defendants' Request for Judicial Notice (citing *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d at 611). Plaintiffs contend, however, that "[c]ontrary to City's assertion, the complaint does not seek to recover damages caused by the CCA's determination 'that the lien of special taxes was prior to the Donlons' lien,'" but rather seeks "Fifth

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[9] In the Appellate Opinion, the Appellate Court found that the Donlons' claim for inverse condemnation was barred by the 30-day statute of limitations. *See* Exhibit G attached to Defendants' Request for Judicial Notice. Nonetheless, the court proceeded to make this further finding.

Amendment 'just compensation' for the lien which was destroyed when the security [] was conveyed . . . to City." Opposition, pg. 8, ln. 19-24, pg. 9, ln. 1. Defendants respond that the Donlons raised that exact argument in their pleadings to the Appellate Court. *See* Reply, pg. 5, ln.25-26. This Court agrees. In Appellants' Opening Brief, Plaintiffs argued to the Appellate Court that just compensation is due pursuant to the Fifth Amendment to the Constitution because there was a "temporary tak[ing] [of] the Donlons' private property." *See* Appellants' Opening Brief attached as Exhibit A in Defendants' Request for Judicial Notice. Furthermore, in Appellants' Reply Brief, Plaintiffs state that "private property [shall not] be taken for public use, without just compensation" (citing to United States Constitution, Fifth Amendment). *Id.* at Exhibit B. These are the same arguments which Plaintiffs raise here. Therefore, because the Appellate Court was presented with the same "takings" argument as is before this Court, and the Appellate Court made a final determination on this issue, this Court is barred from reviewing that determination by the Rooker-Feldman Doctrine. Thus, this Court lacks subject matter jurisdiction over Plaintiffs' claims, and Defendants' Motion for Dismissal is granted.[10]

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[10] Defendants' additionally argue that "the cause of action seeking just compensation is not yet ripe, and the court therefore does not have subject matter jurisdiction, because the Donlons have not sought just compensation through the procedures provided by the courts of California." Motion, pg. 6, ln. 19-23. This Court notes that the ripeness issue is not clearly presented to this court. In any event, this Court does not need to reach this issue in light of its findings under the Rooker-Feldman doctrine.

Defendants also contend that claim preclusion bars both of

2. This Court Declines to Dismiss Based on Its Discretionary Jurisdiction to Provide Declaratory Relief

Defendants move this Court to exercise its discretion to dismiss the claim for declaratory relief based upon 28 U.S.C. section 1341, which limits the jurisdiction of the district court to interfere with issues regarding state and local taxes. This Court finds, however, that Plaintiffs' claim for declaratory relief does not directly seek an invalidation of the Special Tax, but rather seeks a declaration pertaining to the priority of the liens. Therefore, this Court finds that this argument is inapplicable to the issues as presented in the Complaint and, consequently, this Court does not dismiss Plaintiffs' claim on this basis.

3. Even Assuming this Court had Jurisdiction, Plaintiffs' Claim for Just Compensation May be Barred by the Statute of Limitations

Defendants also move this Court to dismiss the Donlons' claim for just compensation because it is barred by the one-year statute of limitations for Section 1983 actions. The Complaint was filed January 19, 2000. Defendants rely on *National Advertising Company v. City of Raleigh*, which held that a cause of action for a regulatory taking accrued when the billboard ordinance was adopted, rather than when the billboard owner realized the injury, because a completed

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the Donlons' claims. *See* Motion, pg. 8, ln. 2-3, pg. 10, ln. 3-4. For the same reasons, this Court finds that it does not need to reach these arguments.

injury had been inflicted on the Plaintiff at that point, and its billboards had immediately become less valuable. *See* Motion, pg. 12, ln. 3-5 (citing 947 F.2d 1158, 1163 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992)). As such, Defendants claim that the "most that the Donlons can possibly argue is that no 'substantial interference' or 'actual concrete injury' was inflicted, on them until after the state court litigation was finished." *Id.* at pg. 12, ln. 13-15. Defendants conclude that, at the latest, Plaintiffs should have filed this action within one year from the time when the Supreme Court of the United States denied writ of certiorari on November 2, 1998. Plaintiffs, on the other hand, contend that a final determination on the "takings" issue did not occur until January 20, 1999, the date that the Subject Property was conveyed to the city, and thus one year had not lapsed. *See* Opposition, pg. 20, ln. 11-13. Plaintiffs rely on *Armstrong v. United States*, which held that a private contractor building boats for the U.S. Government had suffered a taking under the 5th Amendment when the conveyance of the boats to the government destroyed the contractor's lien. *See* 364 U.S. 40, 40 (1960). *Armstrong*, however, did not involve a statute of limitations claim, and thus that issue was not analyzed. The issue in *Armstrong* was whether there was a taking.

At the outset, this Court notes that dismissal of this action is based on the lack of subject matter jurisdiction. Assuming, however, that this Court had jurisdiction, it appears that Defendants are correct that Plaintiffs' claim for just compensation is barred by the statute of limitations. The statute of limitations for all Section 1983 claims in California is one year. *See Wilson v. Garcia*, 471 U.S. 261 (1985). Plaintiffs suffered "substantial interference" or "actual concrete injury" when the Appellate Court ultimately ruled

that there was no taking because the lien of Mello-Roos Special Taxes on the Subject Property superceded the Donlons' Trust Deed as a matter of law. At the latest, then, Plaintiffs should have filed his action within one year from the date the U.S. Supreme Court denied writ of certiorari, which was November 2, 1998. Since Plaintiffs did not file this action until January 19, 2000, their claim for just compensation appears to be barred by the statute of limitations.

III. Conclusion

Based on the foregoing, this Court **grants** Defendants' Motion for Dismissal under FRCP 12(b) for lack of subject matter jurisdiction with prejudice and without leave, to amend.

IT IS SO ORDERED

DATED: April 24, 2000 /s/_____

Dickran Tevrizian Judge
United States District Court

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF VENTURA)

I am employed in the City and County of Ventura, State of California. I am over the age of 18 years, not a party to the action herein, and my business address is 590 Poli Street, Ventura, California 93001.

On the date shown below, I served the foregoing **CIVIL APPEALS DOCKETING STATEMENT** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Kenneth B. Bley, Esq. Attorneys for Defendants
COX, CASTLE & NICHOLSON, LLP
2049 Century Park East, Suite 2800
Los Angeles, California 90067

United States Court of Appeals for the Ninth Circuit Original (By over night mail)
P.O. Box 193939
San Francisco, CA 94119-3939

[X] BY MAIL

[X] I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with postage thereon fully prepaid.

[ ] I am "readily familiar" with the firm's practice

of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Ventura, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[[X] (Federal) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on this 25th day of July, 2000, at Ventura, California.

/s/_____
ELIZABETH RENTERIA

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 00-00607 DT (MANx)

[Filed June 19, 2000]

Roger M. Donlon, an Individual; Roger M. Donlon, Trustee of the Roger M. Donlon Trust; Roger M. Donlon, Trustee of The Roger M. Donlon Trust Dated November 9, 1982; Timothy R. Donlon, an Individual; Timothy Roger Donlon, Trustee for The Benefit of Michael Joseph Donlon; Timothy Roger Donlon, Trustee for the Benefit Of Brion Paul Donlon; Gregory H. Donlon, an Individual; Brion Paul Donlon, An Individual; Kenneth M. McDonald, successor trustee of the Deed of Trust recorded December 3, 1986 as Instrument No. 86-175829 of Official Records of Ventura County, Plaintiffs,	)
v.	)
City of Oxnard, a Municipal Corporation; Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center), a Community Facilities District, Does 1 through 10, Inclusive Defendants.	)

District Court Order - 6/19/00

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGEMENT PURSUANT TO FED. R. CIV. P. 59 (e) AND DENYING MOTION FOR RELIEF FROM JUDGEMENT OR ORDER PURSUANT TO FED. R. CIV. P. 90 (B)

BACKGROUND

A. Factual Summary

This is an action by Plaintiffs ROGER M. DONLON, an individual, ROGER M. DONLON, trustee of the Roger M. Donlon Trust, ROGER M. DONLON, trustee of the Roger M. Donlon Trust dated November 9, 1982, TIMOTHY R. DONLON, an individual, TIMOTHY ROGER DONLON, trustee for the benefit of Michael Joseph Donlon, TIMOTHY ROGER DONLON, trustee for the benefit of Brion Paul Donlon, GREGORY H. DONLON, an individual, BRION PAUL DONLON, an individual, MICHAEL JOSEPH DONLON, an individual (collectively, "Donlons"), KENNETH M. McDONALD ("McDonald"), successor trustee of the Deed of Trust recorded December 3, 1986, as instrument No. 86-175829 of Official Records of Ventura County, (collectively, "Plaintiffs") against Defendants CITY OF OXNARD ("City"), a municipal corporation, COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD (OXNARD TOWN CENTER) ("District"), a Community Facilities District, and Does 1 through 10 (collectively, "Defendants") seeking

The following facts are alleged in the Complaint:

On or about December 3, 1986, real property consisting of 181 acres ("Subject Property"), located in the city, was sold to Warmington-Semler Parters ("Buyer"), a general partnership, for $12 million, paid mostly by a promissory note executed and delivered by Buyer in the principal amount of $11,694,587 ("Purchase Money Note"). *See* complaint, ¶ 15.

Buyer conveyed fee title to the Subject Property to First American Title Insurance Company ("First American") by way of a "corporation seed of trust with assignment of rents" ("Deed of Trust"), which was recorded on December 3, 1986, as Instrument No. 86-175829 of official Records of Ventura County. *Id.* at ¶¶ 16-17.

From December 3, 1986, and continuing until January 20, 1999, First American and its successor trustee, McDonald, (collectively, "Trustee") held fee title to the Subject Property for the benefit of named beneficiaries under the Deed of Trust and their successors, including the Donlons. *Id.* at ¶ 18.

On February 27, 1987, the Donlons purchased an interest in the Purchase Money Note and the underlying Deed of Trust from the owner of the note and beneficiary under the Deed of Trust, and recorded such interest as Instrument No, 87-028354 if official Records of Ventura County. *Id.* at ¶ 19.

On June 28, 1988, the City filed an action ("Validation Action") in the Superior Court of the State of California for the county of Ventura (case no. 102218) on behalf of the District to obtain 'validation' of the city actions, including: (a)

forming the District[1]; (b) authorizing the District to issue $14,770,000 in tax-free bonds ("District's Tax-Free Bonds") which the Oxnard city Council ("city Council") earmarked to fund improvements to thirty acres of real property adjacent to Subject Property ("Commercial Property"); (c) imposing a special-tax ("Special Tax") exclusively on subject Property and Commercial Property of $37 million to pay the District's Tax-Free Bonds and expenses; and (d) allocating and charging the Special Tax, consisting fourteen percent, or $5 million, to Commercial Property and 86%, or $32 million, to Subject Property (collectively, "Formation Actions"). *Id.* at ¶ 22-23.

The Mello-Roos Community Facilities Act of 1982 [California Government Code § 53311, *et seq.*] ("Mello-Roos Act") mandated that the proceeds from the Special Tax must be used exclusively to pay District's Tax-Free Bonds and expenses. *Id.* at ¶ 26.

The Mello-Roos Act also mandated that the City Council must obtain "voter approval" of the Formation Actions. *Id.* at ¶ 27.

In elections to obtain voter approval, the City Council allowed only the fee-title owner of the Commercial Property ("Developer") to vote, and barred every other person from the ballot box. *Id.* at ¶ 28.

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[1] The District is a community facilities district formed in 1988 by the Oxnard City Council under the authority granted to the City Council by "The Mello-Roos Community Facilities Act of 1982," an act passed by the California legislature.

The Mello-Roos Act specifically provided that the Special Tax could not be on, or based upon, ownership of real property. *Id.* at ¶ 29.

Prior to the Formation Actions, the City Council decreed that the Special Tax was "not a tax on or based upon the ownership of real property." *Id.* at ¶ 30.

Plaintiffs claim that the Special Tax is not a true tax, but rather is part of a private financing scheme orchestrated by the City and laundered through the District under color of state law. *Id.* at ¶ 31.

The only notice provided to Trustee of the Donlons regarding the Validation Action of the Formation Actions was by newspaper publication. *Id.* at ¶ 33. Each newspaper publication failed to meet the notice requirements of the due process clause of the 14th Amendment to the United States Constitution. *Id.* at ¶ 34.

In the Validation Action, the City obtained a state court order authorizing the City of serve the summons and complaint by newspaper publication only. *Id.* at ¶ 35.

The state court order was obtained based upon the City's declaration that "the persons who would be interested in the issues before the court would be any person who might acquire property within the district"; and the City "lacks knowledge as to the identity or location of any...persons who may be interested in this action." *Id.* at ¶ 36.

To obtain judgement in state court, the City declared that its Formation Actions were consistent with the 5th and 14th

amendments to the U.S. Constitution because Developer was the only person with a significant interest in the. Formation Actions, and he had received notice and voted. *Id.* at ¶ 38.

There was never any mention in the state court Validation Action or the Formation Actions of the previously recorded Deed of Trust of the Donlon previously recorded interest in it. *Id.* at ¶ 39-41.

On August 12, 1988, the City obtained a state court default judgement in the Validation Action ("Validation Judgement"). *Id.* at ¶ 43.

Whether the City's Special Tax did or did not have lien priority over the Deed of Trust was a matter which could have been adjudicated by the state court in the Validation Action. *Id.* at ¶ 46.

It is certain that, from the representations made by the city to the state court, the Validation Judgement adjudicated the issue of lien priority, in favor of the previously recorded Deed of Trust. *Id.* at ¶ 47. The City and the District dispute this contention. *Id.* at ¶ 50.

Plaintiffs desire a judicial determination from this Court that the state court Validation Judgement is a final judgement binding and enforceable against the City and the District on the issue of lien priority. *Id.* at ¶ 51.

In addition to a declaration by this Court that the Deed of Trust has lien priority over the Special Tax, Plaintiffs seek just compensation for private property taken from Plaintiffs by the city and the District for public use. *Id.* at ¶ 54.

The District's Tax Free Bonds were sold and proceeds used to fund improvements to Commercial Property. *Id.* at ¶ 56. The Subject Property benefitted from neither the bonds nor the improvements. *Id.* at ¶ 57.

Developer, while paying the Special Tax on Commercial Property, immediately defaulted on payment of Special Tax on Subject Property. *Id.* at ¶ 58.

Based upon the default, on April 12, 1993, the City and the District filed a state court action in the Superior Court of the State of California for the County of Ventura (case no. 1256654) to judicially foreclose on the Subject Property ("Foreclosure Action"). *Id.* at ¶ 60-61.

In the Foreclosure Action, the city and the District, for the first time, asserted that the Special Tax had lien priority over the Deed of Trust, which is neither supported by the Mello-Roos Act or by the laws passed to impose the Special Tax. *Id.* at ¶ 62-65. Furthermore, this contention is refuted by the Validated Judgement and violates Article One, section 10 of the United States Constitution. *Id.* at ¶ 66-67.

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In response, the city and the District filed a motion for summary judgement, claiming that they were not required to record a lien to have a lien because California Government Code section 53340 (of the Mello-Roos Act) automatically provided them with a "continuing lien against each parcel to be foreclosed upon." *Id.* at ¶ 74. On February 2, 1995,

summary judgement was entered in Bank's favor. *Id.* at ¶ 75.

On November 5, 1994, the State Appellate Court held that the trial court had correctly ruled the Mello-Roos Act did not provide the City and the District with a lien. *Id.* At ¶ 78.

However, the State Appellate Court created a new cause of action for the City and the District, reforming the Mello-Roos Act, based upon an argument the City and District never made: that Special Tax "was on or based upon the ownership of real property." *Id.* at ¶ 80. Thus, a lien was applied to the Special Tax by California Revenue and Taxation Code section 2187.[2]

This finding by the State Appellate Court is refuted by Resolution No. 9465 (adopted and passed on June 18, 1988) that the City's Special Tax was "not a tax on or based upon the ownership of real property." *Id.* at ¶ 82. Plaintiffs claim that the finding is also refuted by the Validation Judgment and by the Mello-Roos Act.[3] *Id.* at ¶ 83-84.

Based on the actions of the State Appellate Court, the Special Tax was elevated to the status of an ad valorem property tax in violation of federal and state law. *Id.* at ¶ 88.

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[2] This code section exclusively creates a lien for property taxes imposed on an ad valorem basis by a county. *Id.* at ¶ 81.

[3] California Government Code § 53235.5 of the Mello-Roos Act states that "[a] special tax apportioned on any of these bases shall not be construed to be on or based upon the ownership of real property."

On March 31, 1998, the State Appellate Court issued its opinion against the Donlons ("Appellate Opinion"). *Id.* at ¶ 93.

The Appellate opinion barred the Donlons from stating a cause of action for inverse condemnation, because the claim was alleged to be untimely and the thirty-day statute of limitations had run. *Id.* at ¶ 95.

On January 20, 1999, the County of Ventura conveyed the Subject Property to the District without providing the Donlons with the opportunity to bid at the "tax sale." *Id.* at ¶ 99.

The Donlons and the Trustee had their private property taken for public use.[4] *Id.* at ¶ 100. Plaintiffs are seeking the total unpaid balance of the Purchase Money Note at the time of the taking as their just compensation. *Id.* at ¶ 102.

B. Procedural Summary

On January 19, 2000, Plaintiffs filed the Complaint for Deprivation of Constitutional Rights under Color of State Law.

On February 14, 2000, Defendants filed a Stipulation Extending the Time Within Which to Answer or Otherwise Respond to the Initial Complaint.

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[4] Trustees' private property consisted of title to the Subject Property and the Donlons' private property consisted of the Purchase Money Note and their interest in the Deed of Trust.

On March 15, 2000, Defendants filed a Motion to Dismiss under F.R.C.P. 12(b) and filed a Request for Judicial Notice.[5]

On April 10, 2000, Plaintiffs filed a Request for Judicial Notice.

On April 25, 2000, this Court entered an order granting in part and denying in part Defendants' Request for Judicial Notice, granting in part and denying in part Plaintiffs' Request for Judicial Notice, and granting Defendants' Motion for Dismissal under F.R.C.P. 12(b) for lack of subject matter jurisdiction with prejudice and without leave to amend ('Order').

On May 5, 2000, Plaintiffs filed a Motion to Alter or Amend Judgment under F.R.C.P. 59(e) and a Motion for Relief from Judgment or Order under F.R.C.P. 60(b), which are currently before this court.

II. Discussion

A. Standard

1. Motion to Alter or Amend Judgment

Under F.R.C.P. 59(e), a party may file a motion to alter or amend judgment within ten days after the court enters a judgment. *See* Fed. R. Civ. P. 59(e).

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[5] This Court notes that Defendants erroneously refer to themselves as "Attorneys for Plaintiffs" in their pleadings' captions.

2. Motion for Relief from Judgment or Order

Under F.R.C.P. 60(b), the court may relieve a party from a final judgment or order for one of the following six reasons: (1) mistake, inadvertence, surprise, or excusable neglect has occurred; (2) new evidence has been discovered which by due diligence could not have been discovered in time to move for a new trial; (3) the adverse party engaged in fraud, misrepresentation, or other misconduct; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) "any other reason justifying relief from the operation of the judgement." *See* Fed. R. Civ. P. 60(b).

Rule 60(b)(6) is a catch-all provision that allows a court to vacate a Judgment "whenever such action is appropriate to accomplish justice." *See Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949). However, "extraordinary circumstances" must exist to justify relief. *See United States v. Sparks*, 685 F.2d 1128, 1129 (9th Cir.1982.)

B. Analysis

1. Plaintiffs' Motion to Alter or Amend Judgment Was Filed in a Timely Manner In Accordance with Rule 59 (e).

The Order granting Defendants' motion for dismissal under Rule 12(b) was entered on April 25, 2000. Plaintiffs filed a motion to alter or amend judgment on May 5, 2000. Thus, the motion was filed in a timely manner in accordance with F.R.C.P. 59(e).

2. Plaintiffs' Motion for Relief from Judgment or Order Must Be Denied Because They Do Not Satisfy Any of the Conditions of Rule 60(b).

In its previous Order, this Court determined that it did not have subject matter jurisdiction over Plaintiff's claims because they were barred by the Rooker-Feldman doctrine. This doctrine is based on the principle that a federal district court does not have authority to review the final determination of a state court. Specifically, this Court determined that the Court of Appeal of the State of California, Second Appellate District, Division Six ("Appellate Court") adequately addressed the Plaintiffs' claims for declaratory relief and just compensation. Because the Appellate Court's decision constitutes a final determination, this Court concluded that it did not have the authority to alter it.

In their current motion for relief, Plaintiffs contend that they have been denied a "full and fair opportunity" to litigate their federal claim before the state court and that this denial entitles them to subject matter jurisdiction in federal district court. This contention is substantially similar to the argument that they used to oppose Defendants' motion to dismiss. Instead of attempting to persuade this Court that any one of the conditions specified in Rule 60(b) exist, Plaintiffs simply try to re-litigate the issues that this Court has already considered.

Plaintiffs' notice of motion includes a list of the three grounds on which the motion is based: (a)Errors of law; (b) Manifest injustice; and (c) Excusable neglect. A motion for relief on any of these grounds may be scrutinized under either Rule 60(b)(1) or Rule 60(b)(6).

a. No Error of Law Occurred.

The Plaintiffs contend that an error of law occurred when this Court used the Rooker-Feldman doctrine to dismiss their claim. Specifically, they indicate that this Court's preclusion of their federal claim was incorrect because the "mere" opportunity to raise this claim in state court did not constitute a full and fair hearing. To support this argument, Plaintiffs rely on *United Parcel Service, Inc. v. California Public Utilities Commission*, 77 F.3d 1178 (9th Cir. 1996). However, the plaintiff in the *UPS* case expressly reserved the right to a federal hearing on its federal claims pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (9th Cir. 1964). According to *England*, if a plaintiff intends to preserve his federal claims for adjudication by a federal district court, then he should explicitly inform the state court of this intention. *See id.* at 421. Plaintiffs did not include an *England* disclaimer in their complaint to the state court. Rather, they actively pursued their federal claim until the state court barred the claims based on the statute of limitations.

A full and fair opportunity to litigate a federal claim is lacking only when the state court actually creates a procedural barrier for the plaintiff. *See Communication Telesystems International v. California Public Utility Commission*, 196 F.3d 1011, 1020 (9th Cir. 1999). In *Communications Telesystems*, the court rejected the plaintiff's argument that the California Supreme Court's denial of its petition for review deprived it of an opportunity to litigate its federal claims. *See id.* at 1018. The court distinguished between a state court's decision not to hear a claim that has already been presented and a procedural device that operates

in state court to prevent a plaintiff from initially presenting a claim. *See id.* at 1020. Here, Plaintiffs admit that the state court's enforcement of the statute of limitations was the reason that their federal claims were not heard. Thus, a procedural device did not preclude Plaintiffs from initially presenting their claims.

Furthermore, the court in *Communication Telesystems* emphasized that the federal claim in question need not have been actually litigated during the state proceedings to be precluded in a federal court. *See id.* at 1019. This decision invalidates the crux of Plaintiffs' argument: that the merits of their federal claim were not heard by the state court. Therefore, this Court finds that no error of law occurred.

b. The Donlons Did Not Suffer Manifest Injustice.

Plaintiffs claim that they have suffered manifest injustice as a result of the lack of a full and fair opportunity to litigate their claims due to this Court's mistaken application of the Rooker-Feldman doctrine. Specifically, they assert that this Court's decision not to hear their claims deprived them of the chance to litigate these issues. However, because this Court has found that no error of law occurred, this Court finds that Plaintiffs did not suffer manifest injustice when this Court dismissed their complaint.

c. No Evidence of Excusable Neglect Exists.

As Defendants note in their Opposition, Plaintiffs do not provide any evidence of excusable neglect by either the state court or this Court. Although they list neglect in their

notice as the third ground on which their motion is based, Plaintiffs do not even mention it in the motion itself. Accordingly, this Court finds that no evidence of excusable neglect exists.

3. Plaintiffs' Arguments Concerning the Accrual of the Statute of Limitations Are Not Relevant to Their Motions.

This Court notes that Plaintiffs also discuss the accrual of the statute of limitations with respect to their takings claim in their motion. This argument was addressed by the previous Order, in which this Court determined that even if subject matter jurisdiction were present, Plaintiffs' claims would be barred by the statute of limitations. Plaintiffs' argument simply repeats this issue from the previous motion and is not relevant to their current motion for relief from the Order.

C. Conclusion

Based on the foregoing discussion, this Court hereby **DENIES** Plaintiff's Motion to Alter or Amend Judgement pursuant to Fed. R. Civ. P. 59(e) and **DENIES** Plaintiff's Motion for Relief from Judgment or Order pursuant to Fed. R. Civ. P. 60(b).

IT IS SO ORDERED.

/s/ _____

Dated: June 19, 2000

Dickran Tevrizian, Judge
United States District Court

APPENDIX E

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

2d Civil No. B103714, B107180
(Super. Ct. No. CIV 125654)
(Ventura County)

[Filed March 31, 1998]

CITY OF OXNARD et al.,	)
Plaintiffs, Cross-Defendants	)
and Respondents,	)
	)
v.	)
	)
ROGER M. DONLON et al.,	)
Defendants, Cross-Complainants	)
and Appellants.	)
	)

The Donlons appeal from the second amended summary judgment for judicial foreclosure granted by the trial court to respondents, the City of Oxnard (City) and the Community Facilities District No. 88-1 (District).[1]

[1] Although the judgment concerns numerous other, defendants, the Donlon defendants are the only appellants to the instant consolidated appeal. The Donlon defendants are Roger M.

Oxnard Town Center (OTC), a limited development partnership, owns certain real property within the District. OTC approved the levy of Mello-Roos special taxes on the property within the District to finance construction of infrastructure serving the area. (Gov. Code, §§ 53311 et seq. [Mello-Roos Community Facilities Act of 1982, as amended, hereafter, the Act].)[2]

The Donlons own a large promissory note secured by the first trust deed on certain parcels owned by OTC within the District. The Bank of A. Levy (the Bank) loaned money to OTC and obtained a second trust deed on one of the four parcels within the District as security for its loan. In 1991, OTC defaulted on the Mello-Roos special taxes it owes on the two parcels involved in the foreclosure proceedings at issue here.

In 1993, the City and District filed their complaint against OTC, the Bank, the Donlon parties and others to seek judicial foreclosure of the liens securing payment of the delinquent special taxes. The Donlons filed the instant cross-complaint against OTC, the Bank, the District and others.

Donlon, an individual; Roger M. Donlon, trustee for the Roger M. Donlon Trust; Timothy R. Donlon, an individual; Timothy Roger Donlon, trustee for the benefit of Michael Joseph Donlon; Timothy Roger Donlon, trustee for the benefit of Brion Paul Donlon; Gregory H. Donlon, an individual; Brion Paul Donlon, an individual; and Michael Joseph Donlon, an individual.

[2] All statutory references are to the Government Code unless otherwise stated.

The trial court severed the action into two parts. The first part concerned the City and District's complaint and certain portions of the cross-complaint. The instant, second part concerns issues raised by the Donlons pertaining to their first trust deed.

In 1994, the trial court granted summary judgment to the Bank in the first part of the action. We granted the petition for writ of mandate to compel the trial court to vacate its judgment and to enter judgment denying summary judgment to the Bank. (*City of Oxnard v. Superior Court* (Nov. 22, 1994) B081684 [nonpub. opn.].) We held that the special taxes levied by the District to finance real property improvements constitute a lien superior to the Bank's lien on its second trust deed. We ruled that the City may collect the delinquent special taxes by judicial foreclosure. Our Supreme Court denied the petition for review.

In the instant, second part of the case, the trial court determined that the special taxes levied constitute a lien superior to the Donlons' first trust deed. The trial court ruled that the City may judicially foreclose on the two parcels owned by OTC which are subject to the Donlons' first trust deed to secure payment of the delinquent special taxes.

The Donlons contend that the special taxes are not secured by the lien on real property provided by Revenue and Taxation Code section 2187, that any such lien has no priority over their deed of trust and that the published notice provided to establish the District was unconstitutional.

The Donlons argue that the trial court should have offset the taxes owed by the fair market value of another

parcel which is not in default. They assert that the trial court should have permitted them to amend their cross-complaint to claim inverse condemnation and intentional interference with prospective economic advantage. We disagree with the Donlons and affirm.

We direct the trial court to adhere to the September 18, 1997 order of the bankruptcy court. The bankruptcy court's order does not modify or lift its automatic stay to permit immediate foreclosure, transfer or conveyance of the property or any interest therein. Pursuant to that order, the District may petition the bankruptcy court to grant relief from its automatic stay to foreclose on the property.

FACTS

In 1987, the Donlons acquired the first deed of trust encumbering the subject property. In May 1988, the city council, acting as the legislative body for the District, adopted resolutions of intention to establish the District and to incur bonded indebtedness to construct infrastructure for the District. (§§ 53321, 53345.) The city council provided mailed and published notice of the June 14, 1988 public hearing.

After the hearing, the council established the District, authorized the levy of special taxes to finance infrastructure in the District, declared the necessity to incur the debt and held an election to authorize issuance of up to $14,770,000 in bonds. (§§ 53322, 53325, 53346, 53351.)

There were no registered voters in the District. OTC, the landowner of record, elected to authorize issuance of the bonds to build the infrastructure pursuant to statute. (§§

53327, 53325.7.) The City noticed and certified the election and recorded a notice of special tax authorization for the bonded indebtedness.

In August 1988, the trial court entered judgment on the action filed by the City on behalf of the District to validate establishing the District, assessing the special taxes and issuing the Mello-Roos bonds for the District. The validation judgment stated, inter alia, that the special taxes could be levied as set forth in the formation documents. No appeal ensued from that judgment.

The District issued the bonds and levied the special taxes on the four parcels comprising the District to pay for the authorized infrastructure. In 1988, parcel A was subdivided into nine lots. Two of those lots were combined to form parcel 1 which was sold to Bedford Properties. Parcel 1 contains about 5.5 acres improved by a fully leased six-story commercial building. It also includes an 11,944 square feet wedge of property (the wedge), consisting of a driveway apron and landscaping, which was originally in parcel D. The assessor's office reduced the size of parcel D after the transfer of the wedge to parcel A, and reduced the special taxes levied against parcel D accordingly. In 1995, the Donlons reconveyed their deed of trust encumbering the wedge. All of the special taxes assessed against parcel 1 of parcel A, including those for the wedge, have been paid.

In December 1988, the Bank approved a written loan request on parcel D, acknowledging that parcel D was in the District and was subject to the instant Mello-Roos special taxes. The Bank obtained a second trust deed to parcel D as security for the loan. The Bank required that part of the loan

proceeds be used to pay the special taxes. In 1991, OTC stopped paying the special taxes due on parcels C and D. The delinquent special taxes at issue here, levied against parcels C and D and owned by OTC, have not been paid since December 1991. The lien against the Donlons' interests in the first deed of trust is coincident with the lien for the delinquent special taxes, as reduced.

In April 1993, the City and District filed the instant complaint against OTC, the Donlons, the Bank and others seeking judicial foreclosure of the lien securing the delinquent special taxes on the subject land. (§§ 53356.1, 53356.2.) In August 1993, the Donlons, as holder of the first trust deed, filed the instant cross-complaint against OTC, the Bank, the City, the District and others.

The trial court ordered severance. It stated that the first action will be comprised of " (1) all issues raised by the City of Oxnard's, et al. complaint, specifically the priority and foreclosure issues raised therein; and (2) the portions of the cross-complaint filed by the Donlon parties that assert claims against the City of Oxnard and [the District]. The issues raised by the Donlon parties' et al. cross-complaint against, without limitation, [certain other parties], including all those matters pertaining to the promissory note secured by the first trust deed on the Oxnard Town Center property, are ordered severed." (See *City of Oxnard v. Superior Court, supra,* B081684 [nonpub. opn.].) Thus, all matters pertaining to the instant promissory note secured by the Donlons' first trust deed, including priority and foreclosure issues, were severed for separate trial.

On February 2, 1994, the trial court ordered summary judgment in favor of the Bank's claim of priority of its lien on its second trust deed. We granted an alternative writ to consider the summary judgment granted the Bank. The Donlons, among others, filed opposition arguing that the District has no lien against the real property upon which the City may collect the delinquent special taxes, as here.

On November 22, 1994, we granted the petition compelling the trial court to vacate its order and to enter judgment denying summary judgment to the Bank. We determined that the special taxes levied constitute a lien superior to that of the Bank, created by operation of Revenue and Taxation Code sections 2187 and 2192.1, upon which the City may collect the delinquent special taxes by judicial foreclosure against the parcels of real property within the District. (*City of Oxnard v. Superior Court, supra,* B081684 [nonpub. opn.].)

Revenue and Taxation Code section 2187 states, "Every tax on real property is a lien against the property assessed." (See also §§ 53326 subd. (c); 53340.5.) Revenue and Taxation Code section 2192.1 states, in pertinent part, "Every tax declared in this chapter to be a lien on real property . . . [has] priority over all other liens on the property, regardless of the time of their creation. Any tax . . . described in the preceding sentence shall be given-priority over . . . any . . . deed . . . with respect to which the subject real property may become charged or liable."

Because the special taxes were incurred to finance construction of long-term infrastructure and apportioned on the basis of square footage and acreage, and not on benefit

received, the instant taxes are based on the ownership of real property in the District. (See § 53325.3, *infra*.) We denied the petition for rehearing, and our Supreme Court denied the petition for review.

In 1995, the Donlons twice moved for leave to amend their instant cross-complaint to add causes of action for inverse condemnation, interference with prospective economic advantage and declaratory relief. Both times, the trial court denied the motions.

The trial court granted the City and District's motion for summary judgment on the Donlons' cross-complaint on October 23, 1995. It ruled that respondents established their prima facie case for Judicial foreclosure as a matter of law based on the undisputed facts showing that the District was validly formed, the special taxes validly levied, the delinquent special taxes and penalties are due and owing, and the City, acting as the legislative body for the District, properly authorized the instant judicial foreclosure action pursuant to the formation documents.

The court determined that the special taxes levied are secured by a real property tax lien pursuant to Revenue and Taxation Code section 2187, and that the lien has priority over the first deed of trust owned by the Donlons, pursuant to Revenue and Taxation Code section 2192.1.

The trial court ruled that respondents may foreclose the lien for special taxes, penalties, attorneys' fees and costs due prior to the foreclosure sale. Upon foreclosure, the Donlons were to be barred from all rights, claims, interests or equity of redemption in the property securing their deed of

trust.

The trial court entered its initial judgment in the instant matter on May 10, 1996. It found that the lien of special taxes is prior to that of the instant first trust deed and determined the amount of special taxes, penalties and interest due. On June 24, 1996, the trial court entered its first amended judgment, finding that the special tax had priority over the interests of all defendants regarding the subject property and recalculated the amounts due. On October 11, 1996, the trial court entered its second amended judgment, including costs and attorneys' fees against the Donlons and others, both on the respondents' complaint and on the Donlons' cross-complaint.

On November 19, 1996, the trial court denied the Donlons' motion to credit the fair market value of parcel 1 against the delinquent special taxes owed against parcels C and D, and to marshal the assets of parcel 1 against the judgment for the delinquent taxes on parcel D.

The Donlons filed notices of appeal from the initial and the second amended judgments. We have consolidated the appeals under Case No. B103714.

On August 28, 1997, Gregory H. Donlon filed for bankruptcy under Title 11 of the United States Code to stay any transfer of property for failure to pay the instant delinquent special taxes pending the determination by this court of whether the judgment of the trial court is correct.

We recognized the automatic stay by our order of September 5, 1997. The parties requested that the bankruptcy

court modify the automatic stay to permit this court to decide the instant appeal. The bankruptcy court approved the parties' stipulation. On September 18, 1997, the bankruptcy court issued an order terminating the stay to permit the instant appellate proceedings. The order terminated "the automatic stay as to the [instant] appeal as well as any subsequent appellate proceedings." The scope of relief granted by the bankruptcy court is limited. In particular, the order shall not "operate to or be construed as modifying or lifting the automatic stay in any manner allowing the County of Ventura or District . . . to foreclose on the Property or to otherwise transfer or convey the Property or any interest herein in any fashion or form whatsoever."

We vacated the stay we had imposed on these proceedings so that the cause may proceed on appeal.

DISCUSSION

We independently review the second amended summary judgment granted respondents to determine whether there are any triable issues of fact and whether respondents are entitled to summary judgment as a matter of law. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.) Where, as here, the respondents met their burden to establish a prima facie case and that there is no viable defense to their action, the burden shifts to appellants to show that a triable issue of fact exists by providing additional, specific facts. (Code Civ. Proc., § 437c, subd. (o) (1).) Appellants may not rely upon the mere allegations or denials in their pleadings, but shall set forth the specific facts showing that a triable issue of material fact exists. (*Ibid.*)

Preliminary Issues

"Bedford" wedge as indispensable party; Parcel 1 to pay for delinquent taxes

The Donlons contend that the City's complaint should have been dismissed because the successor owners to the wedge are indispensable parties to the action. They argue that the wedge is part of parcel D; that they are entitled to full credit for payments made on parcel A against the delinquent taxes on parcel D. (§ 53340.) We disagree. The wedge is part of parcel 1 of parcel A, not parcel D. The Donlons are not entitled to the credit they seek.

Section 53340 states that "[i]f any portion of a parcel is encumbered by a lien . . . the entirety of the parcel shall be encumbered by that lien." Because no default in payment of special taxes existed against parcel A, there was no basis to foreclose on the lien of special taxes thereon. The "Bedford" interests are not affected; they are not indispensable parties. The only unpaid special taxes at issue are those against parcels C and D. Section 53340 does not apply here.

In the alternative, the Donlons argue that we should apply the equitable doctrine of marshaling assets from parcel A to cure the default. (Civ. Code, §§ 2899, 3433; and see generally 11 Witkin, Summary Of Cal. Law (9th ed. 1990) Equity, § 175, p. 857.) The driveway apron and landscaping which comprise the wedge are of de minimis value. Aside from the wedge, parcel 1 contains about 5.5 acres improved by "a fully-leased six story commercial building whose value is close to, if not exceeding, the total amount of debt outstanding." It would be inequitable to credit payment of

taxes on parcel I of parcel A against the amounts owing for parcels C and D. (Civ. Code, §§ 2899, 3433; *Harrington v. Taylor* (1917) 176 Cal. 802, 807.)

Leave to Amend

The Donlons argue that the trial court erred when it denied leave to amend their cross-complaint to allege inverse condemnation and intentional interference with prospective economic advantage.

A trial court does not abuse its discretion when it denies leave if the proposed amendments do not state a cause of action or if they are subject to any defense stated. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 1130, pp. 585-586.) Here, the proposed amendments are barred by statutes of limitation and they do not state viable causes of action. The claim for interference is also barred because the City's initiation of judicial foreclosure proceedings is privileged.

Inverse Condemnation

The instant claim for inverse condemnation constitutes an untimely direct attack on the validity of the formation of the District and its authority to levy the assessment of the instant taxes without personal notice to the Donlons. (See generally *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 [statute of limitations on inverse claim based on city's adoption of an ordinance precluding development necessarily challenges the ordinance itself].)

Section 53341 states, in pertinent part, "Any action .

. . to attack, . . . set aside, void, or annul the levy of a special tax shall be commenced within 30 days after the special tax is approved by the voters." (See generally *Hensler v. City of Glendale,* supra, 8 Cal.4th at p. 24; see esp. *New Davidson Brick Co. v. County of Riverside* (1990) 217 Cal.App.3d 1146, 1150-1151.) This short statute of limitations applies here to permit sound fiscal planning by local government entities and to preclude impairing the marketability of the authorized bonds. (See *Hensler,* supra, at pp. 27-28; see esp. *Allis-Chalmers v. City of Oxnard* (1980) 105 Cal.App.3d 876, 881, 883.)

A timely administrative mandamus proceeding, joined with a timely inverse claim, is the vehicle to alert the public agency that the validity of its action is being questioned. (*Hensler v. City of Glendale, supra,* 8 Cal.4th at pp. 19, 26-28; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 608, 612-613; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1496-1497.) The Donlons did not timely attack the validity of the levy of the instant special taxes approved on June 14, 1988, and they failed to petition for writ of administrative mandamus. Furthermore, the Donlons admit that the District was properly formed to authorize the levy of the instant special taxes on the authorized Mello-Roos bonds.

The Donlons argue, however, that they neither knew of the underlying validation action nor that the lien of Mello-Roos special taxes would supersede their first trust deed until respondents filed the foreclosure action in 1993. They assert that the statute of limitations does not begin to run until they had such notice.

Notice is not required and lack of knowledge of such underlying government action does not preclude the running of the applicable statute of limitation to bar inverse condemnation actions. (See generally *Patrick Media Group, Inc. v. California Coastal Com., supra,* 9 Cal.App.4th at pp. 616-617 [billboard company leasing space subject to short limitations statute regarding inverse claim despite its lack of knowledge of development permit obtained by the landowners, conditioned on termination of the billboard lease]; and see generally *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; *Zipperer v. City of Fort Meyers* (11th Cir. 1995) 41 F.3d 619, 624, citing *Federal Deposit Ins. Corp. v. City of New Iberia* (5th Cir. 1991) 921 F.2d 610 as distinguishing and narrowing the application of *Mennonite Board of Missions v. Adams* (1983) 462 U.S. 791 [77 L.Ed.2d 180], cited by the Donlons here.)

The legislative decision to levy special assessments and to provide priority of assessments over previous mortgage liens does not affect mortgagees as does a tax sale; it does not deprive such lienholders, as the Donlons, of due-process. The creation of the instant special district constitutes such a legislative act grounded in the taxing power of the government. (*Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683-684.) Judicial review of these legislative acts is now untimely. (*Horn v. County of Ventura, supra,* 24 Cal.3d at p. 612.)

In an analogous situation, the Fifth Circuit explained that "[t]he mortgagee's interest in the property is derivative from that of the owner. To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to

receive whatever benefit did result from the improvements without having to pay for them." (*Federal Deposit Ins. Corp. v. City of New Iberia, supra*, 921 F.2d at pp. 615-616.) Moreover, the court held that creating tax liens and levying special assessments to pay for construction of public infrastructure does not constitute a taking. *(Id.,* at p. 611.)

The Donlons would be barred by the 30-day statute applicable here under the usual rule that statutes of limitation commence running when affected persons become aware of facts which would make a reasonably prudent person suspicious of possible violation of their rights. (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 101.) The Donlons had inquiry notice and actual knowledge of the District's lien, and its priority, in January 1990. *(Miller v. Bechtel* (1983) 35 Cal.3d 868, 875.) The Donlons did not seek to amend its cross-complaint until March 1995.

An evidentiary stipulation and deposition testimony establish that, as of January 1990, Roger M. Donlon knew about the existence and priority of the District's lien for the Mello-Roos special taxes on the property, as did all the Donlon parties. As of no later than November 1991, the Donlons knew that failure to pay the special taxes would seriously jeopardize their interest in the property.

Indeed, by early 1987, the Donlons' previous counsel, Thomas Ferguson, had been advising Donlon about exchanging other property for an interest in the instant note secured by the instant trust deed. Ferguson provided Donlon with the documents regarding the exchange which Donlon reviewed. These included the note, the instant trust deed and the development agreement.

Ferguson was involved with the formation of the District and he knew that OTC petitioned the City to form the District and to obtain the Mello-Roos bond financing for its infrastructure. He received mailed notice of the City's public hearing to form the District and issue the bonds, and he attended the hearing. (§§ 53322, 53346.) In June 1988, he knew that the special taxes would be levied and that a lien would be placed on the property to secure payment of the Mello-Roos bonds. In December 1991, he knew that the special tax payments had become delinquent and that the City would foreclose on the lien under the Act.

As of December 1988, the Bank had approved a written development loan requested by OTC acknowledging that the instant property was in the District and subject to the Mello-Roos special taxes at issue here. The Bank required that part of the loan proceeds be used to pay the 1988/1989 special taxes for the District. The Bank obtained a second trust deed on the subject property for the $1.6 million loan. The Donlons held and assigned the first trust deed to the property to OTC, in which they were limited partners.

Lastly, there is no taking here because the lien of Mello-Roos special taxes on the real property supersedes the Donlon's trust deed as a matter of law. (See generally *Federal Deposit Ins. Corp. v. City of New Iberia, supra,* 921 F.2d at p. 611.)

Interference with Prospective Economic Advantage

The statute of limitations for intentional interference with prospective economic advantage is two years. (Code Civ. Proc., § 339, subd. (1); *Augusta v. United Service*

Automobile Assn. (1993) 13 Cal.App.4th 4, 10.) No later than January 1990, the Donlons knew that Mello-Roos special taxes had been imposed on the instant property in the District and that the lien securing the taxes might have priority over their deed of trust. The statute of limitations bars the cause of action for interference.

Furthermore, the actions taken by respondents in authorizing judicial foreclosure in January 1992 are subject to the immunities provided by the Tort Claims Act and the litigation pr.i. vilege in Civil Code section 47. (See §§ 815.2, subd. (b); 815.3, subd. (a); 818.2; 820.4; 821.6; and see generally *Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 569-570.)

Constitutionality of Voting Provisions of the Act

The Donlons argue that the provisions of the Act, permitting OTC to authorize the District to issue the instant bonds and to levy the special taxes, violate the Fourteenth Amendment to the United States Constitution and article II, section 2 of the California Constitution (citing *Phoenix v. Kolodziejski* (1970) 399 U.S. 204 [26 L.Ed.2d 523], which concerns general obligation bonds) . (§§ 53327; 53325.7.)

The judgment in the validation action is binding on the Donlons and bars them from "the institution . . . of any action or proceeding raising any issue as to which the [validation] judgment is binding and conclusive." (Code Civ. Proc., § 870.) The Donlons may not raise the various constitutional issues presented here. Moreover, their suffrage rights have not been abridged.

Municipal corporations possess the power to tax as provided by the Constitution or by statutes. *(Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 247-248; *Dawson v. Town of Los Altos Hills, supra,* 16 Cal.3d at pp. 683-684.) Article XIIIA, section 4 of the California Constitution and the Act authorize city councils to impose special taxes to finance public infrastructure of a special district pursuant to two-thirds vote of the applicable electorate. (§§ 53311.5; 53317, subds. (b), (g) & (h); 53328, subd. (a); 53358.)

Only the owners of land located within the proposed District are qualified to vote to form the District, to issue the bonds and to levy the special taxes for the District. (§§ 53318; 53326, subds. (b), (c) .) Pursuant to the vote of the owners of OTC, the City adopted a resolution to incur the bonded indebtedness approved, to record notice of the special tax authorization, to obtain judicial validation of the proceedings to establish the District, to assess the special taxes and to issue the bonds. *(Sts.& Hy. Code,* § 3114.5; §§ 53318, 53340.)

The Merits

The Donlons opine that the instant special taxes are not taxes, that the City had no authority to impose them, and that the taxes are not secured by a lien on the real property which takes priority over its deed of trust.

Our review of the "peculiarly legislative process" of the taxing power of the sovereign is quite narrow. (See *Dawson v. Town of Los Altos Hills, supra,* 16 Cal.3d at pp. 683-684.) Section 53312.5 states that "[t]he local agency may take any actions or make any determinations which it

determines are necessary or convenient to carry out the purposes of this chapter and which are not otherwise prohibited by law." Section 53315 provides that "[t]his chapter shall be liberally construed to effectuate its purposes."

In our previous unpublished opinion concerning the Bank's second trust deed, we considered and rejected the same arguments made here.

Strictly speaking, our 1994 opinion as to the Bank is not law of the case, as respondents suggest, because it only concerned the Bank and not the Donlons. (See generally *People v. Stanley* (1995) 10 Cal.4th 764, 786.) This is so even though the Donlons appeared as real parties in interest and participated in the prior writ proceeding, arguing the same issues. The issues concerning the Donlons' promissory note, at least as they relate to other parties, were tried separately. Nonetheless, the same principles of law which apply to the Bank apply to the Donlons. We briefly discuss them.

"A lien is created: [¶] 1. By contract . . . or, [¶] 2. By operation of law." (Civ. Code, § 2881.) Revenue and Taxation Code section 2187 provides that "[e]very tax on real property is a lien against the property assessed." Revenue and Taxation Code section 104 broadly defines real property to include: "(a) The possession of, claim to, ownership of, or right to the possession of land. [¶] . . . (c): Improvements."

The Donlons again have misconstrued section 53325.3 to assert that the instant special taxes are not based on the ownership of real property. When enacted in 1984, section 53325.3 stated, "A tax imposed pursuant to this chapter is a

special tax and not a special assessment, and there is no requirement that the tax be apportioned on the basis of benefit to any property. However, a special tax levied pursuant to this chapter may be on or based on benefit received by parcels of real property, the cost of making facilities or authorized services available to each parcel, or other reasonable basis as determined by the legislative body. A special tax apportioned on any of these bases shall not be construed to be on or based upon the ownership of real property." In 1996, the Legislature deleted the last sentence of section 53325.3. (Stats. 1996, Ch. 1161, No. 9 Deering's Adv. Legis. Service, § 2, pp. 7596-7597.)

On its face, section 53325.3 explains that Mello-Roos special taxes are not special assessments charged to provide particular benefits to specific parcels of real property. (See *Knox v. City of Orland* (1992) 4 Cal.4th 132, 142.) Section 53325.3 provides that Mello-Roos special taxes need not be apportioned on the basis of particular benefit to any specific parcel in the District. Indeed, the instant taxes were not so apportioned.

The District incurred the debt to finance construction of real property improvements to fulfill the public demand for services in the area likely to result from OTC's development. The instant special taxes were apportioned based on the square footage and acreage of the developed and undeveloped parcels of real property in the District respectively, not on benefit received or on the cost of making facilities or services available to each parcel.

The special tax is based on the ownership of real property in the District, including the instant parcels. The Act

requires the county auditor to report the amount of special taxes collected"and from which property those revenues were collected, identifying any properties which are delinquent .... " (§ 53340.5.) Revenue and Taxation Code section 2187 applies here providing the District with a lien against the real property assessed therein to ensure the payment of the levy of the instant special taxes.

The Donlons opine that the instant lien for the special taxes does not have priority over its mortgage. They are incorrect. It is well-established that there is " . . . no constitutional objection to a legislative provision making the county's lien superior to pre-existing mortgages . . . " (*Guinn v. McReynolds* (1918) 177 Cal. 230, 232, citing *Provident Institution for Savings v. Mayor andAldermen of Jersey City* (1885) 113 U.S. 506 [28 L.Ed. 1102].)

Revenue and Taxation Code section 2192.1 specifically states that "[e]very tax declared in this chapter to be a lien on real property . . . [has] priority over all other liens on the property, regardless of the time of their creation. Any tax . . . described in the preceding sentence shall be given priority over . . . any . . . deed . . . with respect to which, the subject real property may become charged or liable."

The Donlons argue that because the District chose to pursue judicial foreclosure, instead of a state tax sale with a statutory right of redemption within five years, it may not rely on the super-priority generally accorded tax liens on real property. We disagree.

The Donlons misplace their reliance on section 53340.

Section 53340 provides that special taxes shall be collected and be subject to the same procedure, sale and lien priority in case of delinquency as is provided for ad valorem taxes, *"unless another procedure has been authorized in the resolution of formation establishing the district . . . ."* When the District was created, the provisions of section 53340 were discretionary. The resolution forming the District expressly authorized another procedure for collection of delinquent special taxes, the judicial foreclosure sought here, as allowed by statute.

As of 1986, as an alternative and cumulative remedy for the collection of delinquent taxes, section 53356.1 provided that " . . . if any amount levied as a special tax . . . [is] not paid when due, the legislative body may . . . order that the same be collected by an action brought in the superior court to foreclose any lien therefor." (Stats. 1986, ch. 1102, No. 6 Deering's Adv. Legis. Service,. p. 161.)

The Donlons cite *T.M. Cobb Co. v. County of Los Augeles* (1976) 16 Cal.3d 606, 619, for the proposition that where a tax collector has the choice between collecting a delinquent tax under a statute which expressly provides for super-priority and one which does not so provide, and chooses the one which does not so provide, super-priority will not be implied. *(Id.,* pp. 628-630.)

Cobb is inapposite here. From the inception of District, the tax collector did not have the choice to proceed by state tax sale. The resolution of formation expressly requires that collection of delinquent taxes be accomplished by judicial foreclosure within 150 days after notice of delinquency is provided, pursuant to section 53356.1,

subdivision (b), protect investors in the bonds. In any case, as a cumulative remedy, the legislative body may commence judicial foreclosure on any delinquent Mello-Roos special taxes levied to pay the debt within four years of the due date of the last principal installment for special taxes. (§ 53356.1, subd. (a) .)

The instant Judicial foreclosure proceedings comport with both the intent and letter of the Act providing for swift judicial foreclosure proceedings without a lengthy 'redemption period where the formation resolution creating the District provides for it, as here.

The summary judgment is affirmed. We direct the trial court to adhere to the September 18, 1997 order of the bankruptcy court which precludes respondents from foreclosing, transferring or conveying the property or any interest therein subject to further relief which may be granted by the bankruptcy court upon request therefor. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, J., Acting P.J.

YEGAN, J.

State Court of Appeal Decision - 03/31/98

John J. Hunter, Judge

Superior Court County of Ventura

England, Whitfield, Schroeder & Tredway, David W. Tredway, Andrew S. Hughes, Harry R. Hibbs and Kenneth L. McDonald for Defendants, Cross-Complainants and Appellants.

Cox, Castle & Nicholson and Kenneth B. Bley for Plaintiffs, Cross-Defendants and Respondents.

APPENDIX F

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

2d Civil No. B103714, B107180
(Super. Ct. No. CIV 125654)
(Ventura County)

[Filed APRIL 29, 1998]

CITY OF OXNARD et al.,
Plaintiffs, Cross-Defendants
and Respondents,

v.

ROGER M. DONLON et al.,
Defendants, Cross-Complainants
and Appellants.

ORDER MODIFYING OPINION, DENYING REHEARING AND DENYING PUBLICATION

THE COURT:

It is ordered that the opinion filed herein on March 31, 1998, be modified in the following particular:

On page 15, delete the last sentence of the second full paragraph which reads, "The Donlons held and assigned the first trust deed to the property to OTC, in which they were limited partners."

Appellants' petition for rehearing is denied.
Appellants' request for publication is denied.
There is no change in judgment.

APPENDIX G

Appeal No. 00-56226

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER M. DONLON,	)
AN INDIVIDUAL, ET.AL.,	)
Plaintiffs/Appellants,	)
	)
v.	)
	)
CITY OF OXNARD, A MUNICIPAL CORPORATION, ET. AL.,	)
Defendants/Respondents,	)

APPEAL FROM THE U. S. DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Los Angeles)
DC# CV-00-00607-DT (MANx)
Hon. Dickran Tevrizian, Presiding

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

TO THE CLERK , UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Plaintiffs and Appellants (herein the "Donlons"), petition the Court for rehearing under *Federal Rules of Appellate Procedure*, Rule 40 in the captioned matter with reference to the Memorandum Decision (herein "Opinion") entered on November 2, 2001 and suggest that a rehearing *en banc* is appropriate.

STATEMENT OF COUNSEL & GROUNDS FOR REHEARING

In the judgment of counsel for the Donlons a rehearing is warranted for the following reasons:

(1) The Opinion's conclusion that *Rooker-Feldman* deprives the District Court of jurisdiction to hear the federal taking claims contained in the Donlons' that Second Cause of Action, assumes without discussion, that the United States Supreme Court had Article III appellate *certiorari* jurisdiction to consider the merits of these claims upon review of the prior state court decision. This assumption directly conflicts with this Circuit's decisions in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir., 1985) ("*Robinson I*") and *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir., 1989) ("*Robinson II*") and the United States Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 191 (1985) ("*Williamson*

County"). Those cases hold that there is no justiciable federal "taking" claim for any Article III court to consider until after state law, as declared by the state courts, is employed to deprive the Donlons' of their property in violation of the Fifth and Fourteenth Amendments.

(2) In concluding that *Rooker Feldman* applies to the Donlons' First Cause of Action (which sought reinstatement of their lien priority) the Opinion also overlooks the fact that by granting *certiorari* in *Robinson I* , and remanding it for further consideration under *Williamson County,* the United States Supreme Court made it absolutely clear that *Rooker-Feldman* has no application where the state court's prior decision construed state law in a fashion which *might or might not* be later used in contravention of the Fifth Amendment to force one property owner *"alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."* (*Armstrong v. United States*, 364 U.S. 40, 48 (1960) ("*Armstrong*").) The Supreme Court had no power to order the California Courts to adopt a "saving construction" for its "priority" statute any more than it had Article III jurisdiction to order the Hawaii Supreme Court to adopt a different state water rights law in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, 1344 (1973), cert. denied, 417 U.S. 976, appeal dismissed, 417 U.S. 962 (1974) (" *McBryde*"). To suggest otherwise is to suggest that the federal courts can prohibit a taking when *Williamson County* says they cannot. By failing to consider this issue, the Opinion incorrectly attributes the lack of subject matter jurisdiction over the Donlons' First Cause of Action to the *Rooker-Feldman* doctrine.

(3) The Opinion also conflicts with this Circuit's

decisions in *Macri v. King County,* 126 F.3d 1125, 1129-1130 (9th Cir., 1997) ("*Macri*") and *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir., 1995) ("*Hood River*"). These cases hold that (a) plaintiffs are not required to join a federal taking claim with a state inverse condemnation pending in state court, and (b) a state court inverse condemnation decision is only relevant in a subsequent federal action to the affirmative defense of "issue preclusion." The underlying premise of this rule is clear. A federal taking claim is not considered in this Circuit to be "inextricably intertwined" (for purposes of subject matter jurisdiction under *Rooker-Feldman*) with a state inverse condemnation claim.

(4) The "issue preclusion" defense needs to be addressed. This Circuit's holding in *United Parcel Service, Inc. v. California Public Utilities Commission,* 77 F.3d 1178, 1184 (9th Cir., 1996) denies preclusive effect to any state judgment where that the party against whom preclusion is urged was not be afforded a "full and fair opportunity" to litigate his federal claims in state court. Here, the undisputed facts establish the state court flatly refused to consider the "merits" of any of the arguments raised by the Donlons under the Fifth and Fourteenth Amendments. Specifically, the state court held: "*[t]he Donlons may not raise the various constitutional issues presented here.*" (1 AER 110.)

(5) Finally, the Opinion mistakenly uses *Rooker-Feldman* to oust the district court of jurisdiction to hear and decide Fifth Amendment claims when those very claims are grounded on binding effect of the prior state court judgment.

These points are all material to the decision in this

case. They are more fully discussed in the following Memorandum of Points and Authorities.

SUGGESTION FOR REHEARING *EN BANC*

In the judgment of the Donlons' attorneys, a rehearing *en banc* is appropriate in this case because it presents important questions of Article III jurisdiction and the appropriate application of *Rooker-Feldman* and principles of issue and claim preclusion to federal "taking" actions brought in the district courts under 42 U.S.C.§ 1983.

MEMORANDUM OF POINTS AND AUTHORITIES

1. THE DECISION OVERLOOKS RELEVANT AND UNDISPUTED MATERIAL FACTS.

The Opinion's brief statement that "*the state court determined that the Donlons' interest in a 181-acre plot of land located in the City of Oxnard was subordinate to Oxnard's [Defendants'] interest in the property, a tax lien*" (Opinion, p. 1) overlooks the following facts which are material and relevant to its conclusion that *Rooker-Feldman* deprives the district court of jurisdiction to hear and decide the Donlons' 42 U.S.C. § 1983 claims on their merits.

In 1988, Defendants filed their first state court action to "*validate*" a $32 million lien imposed against the Donlons' property for the purpose of repaying the lion's share of a $14.77 million bond offering, the proceeds of which could only be used to pay for public improvements to adjoining property owned by the only entity allowed to vote on the bond offering and the special tax levy. The Donlons have no

interest in the adjoining property; its public improvements are of no special benefit to the Donlons.

Despite the Donlons' previously recorded interest in the property embraced by the validation action and their clear and certain interest in its outcome, the validation action was conduced and a default judgment was entered in it without notice to the Donlons.

In 1993, Defendants filed a second state court action to "*judicially foreclose*" on the Donlons' property for non-payment of the special tax levy. In this second state court action the state court held three things of crucial importance to the Donlons' federal claims:

One: That state law subordinated the Donlons' previously recorded interest in their property to Defendants' subsequently imposed special tax lien.

Two: That the Donlons could not file an inverse condemnation action grounded on Article I, Section 9 of the California Constitution (which commands that compensation be paid to the owner or into court before his property is taken or damaged for pubic use) because:

> "[t]he [Donlons' proposed] instant claim for inverse condemnation constitutes an untimely attack on the validity of the formation of the District and its authority to levy the assessment of the instant taxes without personal notice to the Donlons." (State court of appeals' opinion, page 11, 1 AER 106) (emphasis added);

Three: That the Donlons could not present their federal claims and defenses in the second state court action (for judicial foreclosure) because it was too late for state courts to consider them. On this issue the state court held:

> "[t]he judgment in the *validation* action is binding on the Donlons and bars them from the institution of . . . any action or proceeding or raising any issue as to which the judgment is binding and conclusive. (Citation to state law omitted here.) *The Donlons may not raise the various constitutional issues presented here.*" (State court of appeals' opinion, page 16, 1 AER 110) (emphasis added).

On January 20, 1999, Defendants took and destroyed the Donlons' private property for a public purpose (the payment of bonds) by causing it to be conveyed -- free of the Donlons' interest in it -- to one of the Defendants.

2. THE COURT HAS FAILED TO CONSIDER WHETHER THE DONLONS' PRESENT CASE SEEKS TO PRESENT AN ARTICLE III "CASE OR CONTROVERSY" THAT WAS SUBJECT TO *CERTIORARI* REVIEW BY THE UNITED STATES SUPREME COURT FOLLOWING THE PRIOR STATE DECISION.

In *Gruntz v. County of Los Angeles* (*In re Gruntz*), 202 F.3d 1074, 1078 (9th Cir., 2000) (*en banc*), this Circuit stressed:

> ". . . the statutes that form the basis of the *Rooker-Feldman* doctrine [i.e., 28 U.S.C. §§ 1257 and 1331] co-exist among other federal jurisdictional laws. To derive a coherent theory of federal jurisdiction, one must consider the entire federal jurisdictional constellation." *In re Gruntz, supra,* 202 F.3d at 1079. (bracketed material added).

As the United States Supreme Court made clear in *District of Columbia Court of Appeal v. Feldman,* 460 U.S. 462 (1983) ("*Feldman*") the brightest star in that constellation and the one around which all others revolve is the basic federal "case or controversy" requirement set forth in Article III of the United States Constitution.

The *Feldman* majority, before invoking *Rooker-Feldman*, addressed its own Article III "case or controversy" jurisdiction as its first order of business. (*Feldman, supra,* 460 U.S. at 479.) Only after concluding the court would have had jurisdiction to consider the federal issues the plaintiffs were seeking to litigate in the district court, had they been raised by a petition for a writ of *certiorari* from the prior Court of Appeals for the District of Columbia decision, did the *Feldman* majority conclude that the district court lacked jurisdiction. Justice Steven dissented in *Feldman* solely because he did not believe the prior decision presented a federal "case or controversy" that was subject to Supreme Court review. (*Feldman, supra,* 460 U.S. at 489-490.)

Thus, the first question that ***must be asked and answered*** by any court before invoking *Rooker-Feldman* is whether the federal questions presented to the district court

are federal questions that would have been ripe for review by the United States Supreme Court in exercise of its exclusive appellate jurisdiction under 28 U.S.C. § 1257. This the Court has failed to do in the case at bar.

The *Feldman* Court also held that parties seeking to vindicate a federal right have an obligation to press those arguments in state court as a predicate to *certiorari* review by the Supreme Court. On that score, the *Feldman* Court stressed:

> "one of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those arguments." *Feldman, supra,* 460 U.S. at 483.

The Donlons unquestionably complied with this obligation. The Donlons vigorously pressed their federal constitutional arguments in state court in support of their request that the state court adopt a "saving construction" of no priority. But what the Court appears to overlook is that by raising these arguments in state court, the Donlons could not *ipse dixit* confer Article III jurisdiction on the United States Supreme Court to reverse the state court on the "priority" issue.

Just as the Supreme Court lacked Article III jurisdiction to order the Hawaii Supreme Court to adopt a different state water rights law in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330, 1344 (1973), cert. denied, 417 U.S. 976, appeal dismissed, 417 U.S. 962 (1974) (" *McBryde*") because the state law as articulated by the Hawaii Supreme Court in *McBryde* might at some point in the future affect a taking of the Robinson's private property for public use without just compensation, it lacked jurisdiction to reverse the California Court of Appeals' construction of the state priority statutes.

It is this settled principle of Article III jurisdiction that caused the Supreme Court to remand *Robinson I* for further consideration under *Williamson County* and it is this settled principle of Article III jurisdiction that caused this Circuit to conclude in *Robinson II* that the plaintiffs had no cognizable federal claim until the state law in question had been applied to result in a concrete injury. The United States Supreme Court's decision in *Williamson County* is based on one fundamental and unalterable principle: all federal courts lack jurisdiction to enjoin a state from taking private property for public use. It is only after private property has been taken and compensation has been denied under state law do the federal courts have jurisdiction to act. And, at that point in time jurisdiction to grant relief under 42 U.S.C. § 1983 lies with the district courts, not the Supreme Court.

This Circuit's decision in *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 222 (9th Cir., 1994) which is cited in the Opinion does not hold otherwise. In that case, as in both *Rooker* and *Feldman*, there was a final, permanent, definitive and concrete application of state law to the

plaintiffs' situation which could have been reviewed on *certiorari* by the United States Supreme Court. What *Williamson County* makes perfectly clear is that the same was not true in *Robinson I* and *Robinson II* and it is not true here.

A rehearing should be granted to make the necessary Article III inquiry in the case at bar because by omitting that inquiry, the Court has erroneously applied *Rooker-Feldman* to 42 U.S.C. § 1983 claims which were not "intertwined with" but rather are "based on" and "arise from" and the state court's "priority" determination.

3. THIS CIRCUIT'S DECISIONS IN *MARCI* AND *HOOD RIVER* MAKE THE DISTRICT COURT'S SUBJECT MATTER JURISDICTION ABSOLUTELY CLEAR.

In *Macri v. King County,* 126 F.3d 1125, 1129-1130 (9th Cir., 1997) ("*Macri*") and *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir., 1995) ("*Hood River*"), this Circuit held that, even in a case where the Article III case or controversy required by the first prong of *Williamson County* is satisfied (which it was not here),[3] the failure of a plaintiff to raise a federal takings claim in state court does not deprive the district court of jurisdiction to consider a subsequent federal taking claim in federal court. This rule appears to rest on the assumption that a federal taking claim would not be considered "inextricably intertwined" with a state inverse

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[3] As pointed out above, under *Williamson County* the Donlons did not have a justiciable federal damage claim under 42 U.S.C. § 1983 until their lien was extinguished on January 20, 1999 well after the state proceedings were final.

condemnation claim for purposes of *Rooker- Feldman*.

What *Macri* and *Hood River* also make clear is that the state court's dictum that the Donlons have no right to bring a state inverse condemnation claim because "there was no taking because Oxnard's interest in the property superceded that of the Donlons" (Opinion, Page 4) has nothing to do with the application of *Rooker-Feldman* to the case at bar. The majority and dissenting opinions in *Hood River* agree on one thing. The only issue to which this statement may be relevant is the affirmative defense of "issue preclusion."

As to that affirmative defense, this statement has no binding effect on the Donlons federal claims under 42 U.S.C. § 1983. This Circuit's decision in *United Parcel Service, Inc. v. California Public Utilities Commission* 77 F.3d 1178, 1184 (9th Cir., 1996) dictates that issue preclusion can not apply to federal issues the state court refused to consider "on the merits." Here, the state court flatly refused to consider the "merits" of any of the federal constitutional issues raised by the Donlons under the Fifth and Fourteenth Amendments by holding: *"[t]he Donlons may not raise the various constitutional issues presented here."* (1 AER 110.)

Even if one disregards the fact that the state court refused to reach the "merits" of any of the Donlons' federal claims and read this statement as declaring that the Donlons would have no meritorious federal Fifth Amendment "taking" claim defendants later use their "priority" to destroy the Donlons' lien, it is still not binding on the federal courts. A state court's advisory decision on issues of federal law, precisely because *they are not subject to review in any federal court*, are not binding on any court, state or federal, for

purposes of issue preclusion. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 636 (1989) (Rehnquist, C.J. concurring and dissenting).

4. THE OPINION ERRONEOUSLY APPLIES *ROOKER-FELDMAN* TO DONLONS' FIFTH AMENDMENT CLAIMS DESPITE THE FACT THAT THESE VERY CLAIMS ARE GROUNDED ON THE BINDING EFFECT OF THE PRIOR STATE COURT JUDGMENT.

While it is true the Donlons vigorously urged the state court not to grant Defendants' lien super-priority because their exercise of that priority would, most likely, give rise to a Fifth Amendment claim, it is not true, as the Opinion holds, that "*[t]his case falls squarely within the Rooker-Feldman doctrine.*" (Opinion, page 2.) And, it is not true, as the Opinion suggests, that federal law penalizes the Donlons for their spirited resistance to the subordination by banning the Donlons from federal court, if Defendants later used the lien priority state law provided them to take and destroy the Donlons' private property.

From *Williamson County* and its companion cases, it is clear the Donlons' Fifth Amendment claims were not "ripe" for adjudication in any court unless and until Defendants took final and definite action to enforce the state court judgment against the Donlons and no district court has the jurisdiction to hear the Donlons' Fifth Amendment claims unless state law fails to provide them with just compensation or "*a fair and adequate*" means for obtaining it in state court.

It is also perfectly clear that the Donlons' claims do not depend on proving the state court was wrong on any point. Rather, the Donlons claims are grounded on the validity of the prior state court judgment's holding that state law does not provide the Donlons with just compensation or "*a fair and adequate means*" for obtaining it in state court.

CONCLUSION

The bottom line is the Donlons patiently waited, (as they must, under *Williamson County*), for Defendants to take final action on their property. When that final action took and destroyed the Donlons' private property under circumstances which deprived them of just compensation, the Donlons turned to the district court for relief armed with the two procedural "*ripeness*" requirements mandated by *Williamson County*.

The claims the Donlons filed in district court are not "*inextricably intertwined*" with any issue the state court decided for purposes of *Rooker-Feldman*. Rather, they are based on the final holding the state court made granting Defendants' lien priority and its holding that state law would not provide the Donlons with just compensation when and if their property is taken.

Congress specifically empowered the district court (42 U.S.C. § 1983) to hear and decide the Donlons' federal claims.

Rooker-Feldman does not deprive the district court of that jurisdiction.

Petition for Rehearing & Suggestion for Rehearing En Banc

The Donlons' petition for rehearing should be granted and the Opinion should be withdrawn or vacated.

DATE: November 15, 2001.

Respectfully submitted,

HEILY & BLASE
A Professional Law Corporation

By_____
John R. Johnson
Attorneys for Appellant
Roger M. Donlon, an individual, et al.

Form 8.

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 00-56226

Pursuant to Federal R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Petition for Rehearing uses proportionately spaced type, has a typeface of 14 points, and contains 3,757 words.

DATED: November 15, 2001.

_____

John R. Johnson

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I am employed in the City and County of Ventura, State of California. I am over the age of 18 years, not a party to the action herein, and my business address is 590 Poli Street, Ventura, California 93001-2633.

On November 15, 2001, I served the foregoing document described as **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*** on the interested parties to this action.

[X] (BY MAIL) By placing a true copy thereof enclosed in a sealed envelope with postage thereon, fully prepaid, in the United States mail at Ventura, California, OR

[ ] (BY PERSONAL SERVICE) I caused said envelope to be delivered by hand to the offices of the addressee.

ADDRESSED AS FOLLOWS:

SEE ATTACHED SERVICE LIST

[ ] (STATE) I declare under penalty of perjury that the foregoing is true and correct. Executed at Ventura, California on this _____ day of _____, 2001.

[X] (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. Executed on this 15th day of November, 2001.

_____

Joi Kawaguchi Searson, CLA

Petition for Rehearing & Suggestion for Rehearing En Banc

SERVICE LIST

United States Court of Appeal
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

(Original and 50 copies via Express Mail overnight delivery)

Kenneth B. Bley, Esq.
COX, CASTLE & NICHOLSON, LLP
2049 Century Park East, Suite 2800
Los Angeles, California 90067

(Attorneys for Defendants)

The Honorable Dickran Tevrizian
UNITED STATES DISTRICT COURT
Central District of California
312 North Spring Street
Los Angeles, CA 90012-4793

(1 copy)